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In The

Supreme Court of The United States

October Term, 1994

ROBERT L. SCHULZ, JOHN SALVADOR, JR., GILBERT O. BOEHM, CHARLES D. BURGE, PHD., LELAND D. RYAN, SUZAN DIANE LA DUE, DOUGLAS FREDERICK WATSON, RICHARD ALLEN BERRY, JOHN B. SIBLEY, JR., CLAUDE F. SPROWLS, GARY L. WILLIAMS, ANDREA VECCHIO, STEPHEN LANDE, ERICK FRENKE, TAI AGUIRRE, EDWARD THOMAS, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and EMANUEL A. CATANUTO,

Petitioners,

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, SENATE PRESIDENT PRO-TEM, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; THE OFFICE OF THE STATE COMPTROLLER, H. CARL MC CALL, COMPTROLLER; THE OFFICE OF THE DIVISION OF THE BUDGET, PATRICK J. BULGARO, DIRECTOR; THE METROPOLITAN TRANSPORTATION AUTHORITY, ROBERT R. KILEY, CHAIRMAN; THE NEW YORK STATE THRUWAY AUTHORITY, PETER TUFO, CHAIRMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether defendant Mario M. Cuomo (Governor of the State of New York), Saul Weprin (Speaker of the Assembly), and Ralph Marino (Majority Leader of the Senate) acting under color of law, deprived plaintiffs of their federal right, under the Fifth, Ninth and Fourteenth Amendments to the United States Constitution, against a taking of their (money) property, through taxes and fees, without (state constitutional) due process, when they passed and signed into law Chapter 56 of the Laws of 1993, which authorized two state public corporations to issue long-term, state tax and state credit supported state debt, without voter approval, in violation of three state constitutional debt-limiting provisions -- Article X Section 5, Article VII Section 8 and Article VII Section 11.

2. Whether, under the First and Ninth Amendments to the United States Constitution, plaintiffs have been unconstitutionally twice denied their right to petition their government for a redress of grievances by being prevented from challenging the Act as violative of the State Constitution, Article X Section 5 and Article VII Section 8.

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case except that George Pataki is the Governor-elect; Sheldon Silver is the Speaker of the Assembly and Rudy Runko is the Director of the Division of the Budget.

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IN THE
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ROBERT L. SCHULZ, JOHN SALVADOR, JR., GILBERT 0. BOEHM, CHARLES D. BURGE, PHD., LELAND D. RYAN, SUZAN DIANE LA DUE, DOUGLAS FREDERICK WATSON, RICHARD ALLEN BERRY, JOHN B. SIBLEY, JR., CLAUDE F. SPROWLS, GARY L. WILLIAMS, ANDREA VECCHIO, STEPHEN LANDE, ERICK FRENKE, TAI AGUIRRE, EDWARD THOMAS, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and EMANUEL A. CATANUTO,

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THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, SENATE PRESIDENT PRO-TEM, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; THE OFFICE OF THE STATE COMPTROLLER, H. CARL MC CALL, COMPTROLLER; THE OFFICE OF THE DIVISION OF THE BUDGET, PATRICK J. BULGARO, DIRECTOR; THE METROPOLITAN TRANSPORTATION AUTHORITY, ROBERT R. KILEY, CHAIRMAN; THE NEW YORK STATE THRUWAY AUTHORITY, PETER TUFO, CHAIRMAN,

Respondents.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Appendix A, at pages A-1 to A-20), is reported at 84 NY2d 231.

The opinion of the Appellate Division, Third Department (Appendix B, at pages A-21 to A-31) is reported at 193 AD2d 171.

The judgment of the Supreme Court, Albany County (Appendix C, at pages A-32 to A-45) is reported at 156 Misc.2d 169.

The order of the New York Court of Appeals (Appendix D at page A-46) denying the motion for reargument is reported at 84 NY2d 851.

JURISDICTION

The opinion and order of the New York Court of Appeals was entered on June 30, 1994. The Order of the New York Court of Appeals denying the motion for reargument was dated September 1, 1994.

In accordance with Rule 13.4 of this Court, this petition is filed within 90 days of the date of denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983: "Civil Action For Deprivation of Civil Rights. Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law...abridging...the right of people peaceably...to petition the Government for a redress of grievances."

3. The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall...be deprived of...liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

4. The Ninth Amendment to the United States Constitution provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage

others retained by the people.

5. The Fourteenth Amendment to the Unites States Constitution provides, in relevant part: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of...liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

6. Article IV, § 4 of the United States Constitution reads, in relevant part: "The United States shall guarantee to every state in the Union a Republican form of government...."

7. Chapter 56 of the New York Laws of 1993, §§ 7, 10, 13-15, 16-17, 19, 33-35, 39-40 and 132 (Appendix E, pp. A-47 to A-81).

8. Article X, Section 5 of the New York Constitution provides, in relevant part: "Neither the state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by...a public corporation heretofore or hereafter created, nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision thereof."

9. Article VII, § 8 of the New York Constitution provides, in relevant part: "nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking." (Plaintiffs' emphasis).

10. Article VII, § 11 of the New York Constitution provides, in relevant part: "...no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law for some single work or purpose to be distinctly specified therein. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election..."

11. Article I, § 9.1 of the New York Constitution provides, in relevant part: "No law shall be passed

abridging the rights of people peaceably to...petition the government, or any department thereof;"

12. Article I, § 6 of the New York Constitution reads, in relevant part: "No person shall be deprived of...liberty or property without due process of law."

13. Article I, § 7 of the New York Constitution provides, in relevant part: "Private property shall not be taken for public use without just compensation."

14. Article VII, § 7 of the New York Constitution provides, in relevant part: "No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law."

15. Article VII, § 16 of the New York Constitution provides, in relevant part: "The Legislature shall annually provide by appropriation for the payment of the interest upon and installments of principal of all debts created on behalf of the state...as the same shall fall due...If at any time the Legislature shall fail to make any such appropriation the comptroller shall set apart from the first revenues thereafter received, applicable to the general fund of the state, a sum sufficient to pay such interest...and shall so apply the moneys thus set apart. The comptroller may be required to set aside and apply such revenues as aforesaid, at the suit of any holder of such bonds." (Plaintiffs' emphasis).

16. State Finance Law Section 123-b provides in relevant part: "any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property...." (Plaintiffs' emphasis).

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On April 15, 1993, in violation of the three state debt-limiting provisions of the New York Constitution (Article X Section 5 and Article VII, Sections 8 and 11), the New York State Legislature passed Chapter 56 of the Laws of 1993 which Chapter authorized two state public corporations -- the Thruway Authority and the Metropolitan Transportation Authority ("MTA") -- to issue, without voter approval, $6 billion in tax-supported, 30-year bonds, over a four-year period. Solely state funds derived from state taxes and fees imposed statewide were/are to be used to service the new debt.

On April 15, 1993, the New York State Legislature also passed and the Governor signed, the annual Debt Service Appropriation Act for 1993-1994, which was "AN ACT making appropriations for the legal requirements of the state...obligations," including appropriations of revenues derived from state taxes and fees imposed statewide, to pay principal and interest on bonds which were to be issued in 1993-1994 under the authority of said Chapter 56 of the Laws of 1993. (Plaintiffs' emphasis). See Appendix G, pp. A-100 to A-108 hereto.

During the 1993-1994 legislative session, while this case was pending before the New York courts, the Legislature passed and the Governor signed, the annual Debt Service Appropriations Act for 1994-1995, which was also, "AN ACT making appropriations for the legal requirements of the state...obligations," including appropriations of revenue derived from state taxes and fees imposed statewide, to make the required payments of principal and interest on bonds to be issued under the authority of said Chapter 56 of the Laws of 1993. (Plaintiffs' emphasis). See Appendix H, pp. A-110 to A-116 hereto.

On May 24, 1993, long before any bonds were scheduled to be issued under said Chapter 56, plaintiffs timely challenged the constitutionality of Sections 7, 10, 13-15, 16-17, 19, 33-35, 39-40 and 132 of said Chapter 56 of the Laws of 1993 (the "Act") as violative of the New York Constitution, and as violative of plaintiffs' federal right against a taking of their (money) property through taxes and fees without (State Constitutional) due process.[1]

The Thruway Authority bonds will be "credit worthy" because the Act mandates that the state and the Thruway Authority enter into a debt service contract which "shall commit" the state to pay to the Authority an amount of money, every year, equal to the principal and interest due on the Authority bonds.

The MTA bonds will be "credit worthy" because under the Act the Legislature is committed to the long-term, year after year, annual transfer of state funds to the MTA, there to be used to pay the debt service on MTA bonds.

The Act directs the state to purchase private insurance which will provide that the insurance company will pay the debt service on the Authority's bonds should the legislature fail to make debt service appropriations. The Act also directs the state to reimburse the insurance company if the insurance company ever has to pay the Authority's debt service. Furthermore, the Act directs that if the legislature doesn't appropriate the money to service the debt and if the insurance company doesn't pay, then the comptroller shall take the "first revenues" into the state's general fund to pay the Authority's debt service.

The Act obviously violates the important debt-limiting provisions which were added to the State Constitution

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[1] Appendix E pp A-47 to A-81 contains a copy of the challenged Sections of Chapter 56. Appendix F pp. A-92 to A-89 is plaintiffs' summary of those sections.

following similarly reckless fiscal practices in the mid-1800's. The Act violates the voter referendum requirement (Article VII, Section 11) which in plain language prohibits the contracting of debt by, or in behalf of, the state, without voter approval. The Act also obviously violates Article X, Section 5, which prohibits the use of public funds to pay any part of any obligations of any public corporation. Finally the Act also violates that section of the Constitution (Article VII, Section 8) which expressly prohibits the state from lending its credit to or in aid of a public corporation (such as the Thruway Authority or the MTA).

The state courts said that the Act did not violate plaintiffs' federal due process rights because it did not violate the voter referendum requirement of the State Constitution because the state's obligation to pay was not a "debt" because, the Court claimed, neither the public corporations nor their bond holders could "enforce" their rights to recover the money they loaned to the state, since the Act itself says that payment by the state to the authority under the debt service contracts are "subject to an annual appropriation by the legislature." The court was wrong! The public corporations and their bond holders would be able to bring a writ of mandamus against the comptroller, if not the legislature, itself, if they weren't paid what was due them. Under Article VII Section 7 of the State Constitution, no money can be paid out of the state treasury except in pursuance to a legislative appropriation and under Article VII, Section 16 the legislature must appropriate the money to pay the state's obligations and if the legislature fails to appropriate the money, the comptroller must use the "first revenues" into the state's general fund to make the payments.

Incredibly, the state Court went on to say, in effect, that the Act does not violate plaintiffs' federal due process rights because of any violation by the Act of Article X Section 5 of the State Constitution. The state Court came to this conclusion not by comparing the Act with Article X Section

5 and plaintiffs' Fifth and Fourteenth Amendment rights but by denying plaintiffs another of their federal constitutional rights -- the right to petition the government for a redress of grievances. The Court of Appeals said that the debt of the public corporations can't be the debt of the state because, simply, Article X, Section 5 was passed to keep public corporations independent of the state, and it must be that they, therefore, are independent under the Act. Totally ignoring the evidence that the plaintiffs painstakingly provided the Court of Appeals, to show that under the Act the public corporations and the state were not independent but, rather, were mutually dependent upon each other, the Court of Appeals simply held that plaintiffs had no right (no standing) to sue the state for violations of Article X, Section 5. The Court of Appeals erred here as well. Not only do plaintiffs have a constitutional right to petition the government for a redress of constitutional grievances (plaintiffs' right to sue rises to a constitutional right on matters constitutional and when to deny standing would create an impenetrable barrier to the questioning of legislative action), but plaintiffs also have a right to sue under SFL Section 123-b if the complaint is that state funds are being disbursed, or expended, unconstitutionally, as would be the case when the state funds are expended to pay the obligations of public corporations in violation of Article X Section 5.

Incredibly, the state Court went on to say, in effect, that the Act does not violate plaintiffs' federal due process rights because of any violation by the Act of Article VII Section 8 of the State Constitution. The state Court came to this conclusion not by comparing the Act with Article VII Section 8 and plaintiffs' Fifth and Fourteenth Amendment rights but by denying plaintiffs another of their federal constitutional rights -- the right to Petition the government for a redress of grievances. The Court of Appeals said that the section of the Constitution (Article VII, Section 8), which prohibits the

state from lending its credit to public Corporations, was vital to the interests of the people if the people were to avoid "fiscal insolvency, collapse, and crisis," but, then, totally ignoring the evidence the plaintiffs had diligently placed before the Court to the effect that under the Act the state was clearly lending its credit to the public corporations, the Court simply ruled that the plaintiffs had no right (no standing) to be in court defending that section of the Constitution. Obviously, the Court of Appeals erred here as well. Not only do plaintiffs have a constitutional right to petition the government for a redress of constitutional grievances (plaintiffs' right to sue rises to a constitutional right on matters constitutional and when to deny standing would create an impenetrable barrier to the questioning of legislative action), but plaintiffs also have a right to sue under SFL Section 123-b if the complaint is that the state is threatening to expend state funds, unconstitutionally, as would be the case when the state threatens to use state funds under a legislatively mandated debt-service contract between the state and the thruway Authority, which contract is for the purpose of "assisting the State of New York in the undertaking of the financing" of various state projects and "to secure and provide for the payment of Authority bonds," and when the state threatens to use its funds "to secure and be applied to the payment of its [the MTA bonds," and when the state threatens to use state funds to purchase debt service insurance, all in clear violation of Article Vll, Section 8.

The Court of Appeals also explained away the Act's requirements for annual payments to the public corporations equal to the payments those corporations were required to make to retire the new bonds authorized under the Act, by stating that the payments to retire the debts were not payments at all, but "gifts." The Court further said that the state could commit to repeated gifts like this, even if some other budgeted program had to suffer. In truth, and incredibly, the Court has said a commitment by a legislative

Act, to give a gift, repeatedly, over many years, in amounts required by the Act to be precisely equal to the annual amount required to retire bonds authorized under that same Act, does not represent the same thing as a promise or an obligation to pay -- though both are pledges and though someone is parting with their money, by lending it to the state based upon those pledges. The Court has clearly created a fiction and is in error.

Finally, the Court of Appeals said that if the people feel that the Governor and the Legislature have taken fiscal gimmickry beyond the point of prudence, they should consider approving the Governor's so-called debt reform constitutional amendment. The Court of Appeals even included the bill number of the Governor's proposed amendment in its decision! This is so radical a departure from the accepted and usual course of judicial proceedings that supervision by the highest Court in the land is called for.

B. STAGE IN PROCEEDINGS WHERE FEDERAL QUESTIONS WERE RAISED

Plaintiffs raised two federal questions in the state courts: (1) the federal question of a taking of plaintiffs' (money) property without (State Constitutional) due process, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, was raised in plaintiffs' original complaint in State Supreme Court and in the Appellate Division and in the Court of Appeals; (2) the federal question of the right to petition the government for a redress of grievances, under the First Amendment to the United States Constitution was not raised in plaintiffs' original complaint (as unnecessary), but was raised in State Supreme Court during the proceedings there and, again, in the Appellate Division and, finally, in the Court of Appeals.

RE: The Federal "Due Process" Question

Plaintiffs' Seventh Claim[2] in their original complaint read as follows:

"125. The allegations heretofore made are hereby realleged as if fully set forth hereat.

126. This claim is filed in order to seek declaratory relief.

127. State defendants have violated debt limiting provisions of the New York Constitution by enacting a law which authorizes state taxes and fees, imposed statewide, to be used to secure and pay the principal and interest on bonds and notes issued by various state authorities without voter approval. See New York Constitution Article VII, Sections 8, 11 and Article X, Section 5. Money otherwise available to reduce plaintiffs' taxes will be unconstitutionally taken from plaintiffs and illegally used to pay the principal and interest on the debt incurred by various state authorities.

128. All provisions of the New York Constitution are factors in the "due process" equation in New York State. Defendants, in violating Article VII, Sections 8 and 11, and Article X, Section 5 of the New York Constitution and, thereby, establishing an illegal purpose for the fruits of plaintiffs' labor -- which fruit is to be forcibly confiscated from plaintiffs -- have also violated plaintiffs' federal constitutional right against a taking of their property without due process and without just compensation as guaranteed by the Fifth and Fourteenth Amendments to the federal Constitution and by 42 U.S.C. Section 1983 and by Article I, Sections 6 and 7 of the State Constitution.

129. All people in New York, including plaintiffs, live under the State Constitution and the Rule of Law. State

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[2] Each of plaintiff' first six claims challenged specific sections of the Act as violative of all three debt-limiting provisions of the New York Constitution -- Article X Section 5, Article VII Section 8 and Article VII Section 11.

defendants must abide by the established procedures and processes under which the relationships between the government and the governed are required to be carried out. The basic elements of due process are the provisions of the Constitutions (federal and state), of statutes, and of rules and regulations which are themselves promulgated by due process. The constitutional provisions and all constitutional laws, rules and regulations are obligatory upon the government and constitutional provisions in particular establish the boundaries of governance.

130. WHEREFORE, it is respectfully requested that this Court grant an order and/or judgment:

a) declaring Sections 7, 10, 16, 17, 19, 13, 14, 15, 33, 34, 35, 39, 40 and 132 of Chapter 56 of the Laws of 1993 to be a "taking without due process" and, as such, violative of the Fifth and Fourteenth Amendments of the federal Constitution and Article I, Sections 6 and 7 of the New York Constitution, and

b) for such other and further relief as to the court may seem just and proper."

Plaintiffs repeated the claim, verbatim, in their brief to the Appellate Division and again in their brief to the Court of Appeals.

Supreme Court held, in effect, (Appendix C), that plaintiffs' federal right against a taking of their (money) property through taxes and fees without (State Constitutional) due process had not been violated because the Act was not violative of the State Constitution Article X Section 5, Article VII Section 8 or Article VII Section 11. However, State Supreme Court ruled this way after first denying plaintiffs their federal right to petition the government by denying plaintiffs standing to challenge the constitutionality of the Act under State Constitution Article X Section 5 and Article VII Section 8, and, after simultaneously ruling that the Act did not violate the State Constitution's Article VII Section 11 requirement for voter approval of state debt

because the debt was not debt because payment of the principal and interest of the bonds was subject to annual appropriation of the legislature and, therefore, the debt was not "legally enforceable."[3]

Under the "Questions Presented" portion of Appellants' brief to the Appellate Division, plaintiffs worded the federal question as follows:

"6. Whether defendants are violating plaintiffs' fundamental right against a taking of their property without due process as guaranteed in the Fifth and Fourteenth Amendments to the federal Constitution and Article I, Section 6 and 7 of the New York Constitution." The Appellate Division affirmed the Supreme Court decision.

Under the "Questions Presented" portion of appellants'

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[3] All three courts turned a blind eye to the law and three of plaintiffs' key arguments in this regard: (1) that under the State Constitution (Article VII Section 7) "No money shall ever be paid out of the state treasury or any of its funds or any of the funds under its management, except in pursuance of an appropriation by law;" and (2) that under the State Constitution (Article VII Section 16) "The Legislature shall annually provide for the payment of the interest upon and installments of principal of all debts created on behalf of the state...If at any time the Legislature shall fail to make any such appropriation, the Comptroller shall set apart from the first revenues thereafter received, applicable to the general fund of the state, a sum sufficient to pay such interest, installments of principal...and shall so apply the moneys set apart;" and (3) a writ of mandamus could be brought against the Comptroller, if not against the Legislature, itself, to compel the performance of the duty commanded by the people -- the payment of the principle of and interest on the bonds.

brief to the Court of Appeals, plaintiffs worded the federal question as follows:

"9. Whether the intent and will of the people as expressed in Article I, Sections 6 and 7 of the New York Constitution and the Fifth and Fourteenth Amendments of the federal Constitution, to live a life free of a taking of their money property by the state in ways that are expressly forbidden by the principal element of the due process equation in New York State -- the New York Constitution -- has been violated by Sections 7, 10, 13-15, 16-17, 19, 33-35, 39-40 and 132 of Chapter 56 L 93 and bonds issued pursuant thereto."

The Court of Appeals held:

"We have reviewed plaintiffs' remaining claims and conclude they lack merit." (See A-20)

RE: The Federal "Right to Petition" Question

As demonstrated in Appendix J hereto, plaintiffs had argued in Supreme Court that, under the circumstances of this case, "plaintiffs' standing rises to a constitutional right on matters constitutional." Plaintiffs made this argument in response to defendants' claim that according to *Wein v Comptroller*, 46 NY2d 394, citizens-taxpayers-plaintiffs had no right to petition under Article VII Section 8 or Article X Section 5, of the New York Constitution.

Supreme Court correctly held (Appendix C p. A-33 hereto) that:

"Plaintiffs are citizen-taxpayers and registered voters in the State of New York. This is an action which seeks a declaratory judgment...for alleged violations of three specific sections of the New York Constitution: Article VII, Section 11; Article VII, Section 8; and Article X, Section 5."

However, Supreme Court incorrectly denied plaintiffs their fundamental right to petition the government for a redress of

grievances suffered as a result of the government's violation of Article X Section 5 and Article VII Section 8. Supreme Court's decision held (See Appendix C, page A-36 herein):

"In a recent decision, *Matter of Schulz v State*, 81 N.Y.2d 336 (1993)...the Court of Appeals ruled that citizen voters have standing to challenge a statutory financing provision as an alleged violation of the referendum requirement set forth in Article VII, Section 11 of the Constitution. However, the Court left undisturbed its prior rulings [*Wein v Comptroller*, 46 NY2d 394] that plaintiffs (other than citizen voters) have no standing to challenge a statutory bond authorization.

Therefore, insofar as the plaintiffs in the within action have challenged Chapter 56 on grounds other than Article VII, Section 11 of the Constitution, they have no standing to do so. Accordingly, this court will deal with the merits of this action only with respect to plaintiffs' challenge to Chapter 56 as citizen voters as an alleged violation of the Constitution's referendum requirement."

Supreme Court based its denial of plaintiffs' federal right to petition the government (by denying plaintiffs standing to challenge the constitutionality of the Act under the State Constitution's Article X Section 5 and Article VII Section 8) on *Wein v Comptroller*, 46 NY2d 394 (1979), which was obviously a "political" decision, written by Judge Wachtler, (who shortly thereafter was named Chief Justice of the New York Court of Appeals) to prevent challenges to actions being taken by the state to bail New York City out of its financial problems -- a decision in which the Court of Appeals so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower courts, as to justify this court's power of

supervision.[4]

Under the "Questions Presented" portion of Appellants' brief to the Appellate Division, plaintiffs had listed the following as a question that had been raised in Supreme Court and was at issue on the appeal to the Appellate Division:

"7. Whether that part of the decision below which denies plaintiffs' standing under Article VII, Section 8 and Article X, Section 5, of the New York Constitution violates plaintiffs' fundamental right to petition the government as guaranteed in the First and Ninth Amendments to the federal Constitution and in Article I, Section 9, of the New York Constitution?"

On appeal to the New York State Appellate Division, Third Department, plaintiffs pleaded with the Appellate Division not to deny plaintiffs their federal right to petition the government for a redress of grievances as follows:

"Judge Spain's decision not only ignores the spirit and the letter of the common law (Schulz I) it ignores plaintiffs' fundamental rights to petition the government for a redress of grievances (First and Ninth Amendments to the Federal Constitution and Article I, Section 9 of the New York Constitution) and against a taking of plaintiffs money property without due process (Fifth and Fourteenth Amendments to the Federal Constitution and Article I, Sections 6 and 7 of the New York Constitution).

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[4] A copy of the decision in *Wein v Comptroller*, 46 NY2d 394 (1979) is included herewith at Appendix I pp. A-107 to A-115. Plaintiffs' arguments as submitted at each stage of the proceedings below, in opposition to *Wein* is included here as Appendix J, pp. A-116 to A-118.

The Appellate Division upheld Supreme Court's denial of plaintiffs' standing to sue -- i.e., their fundamental right to petition for a redress of grievances under Article VII Section 8 and Article X Section 5 of the New York Constitution. In its decision, the Appellate Division held:

"As a threshold issue, plaintiffs contend that Supreme Court erred in concluding that they lacked standing to challenge the subject financing provisions as violative of NY Constitution, Article VII, Section 8 and NY Constitution, article X, Section 5. We disagree. Because plaintiffs are challenging the Legislature's authorization of bond issues, they cannot claim statutory standing pursuant to State Finance Law Section 123-b. It is equally clear that they have no common-law standing as taxpayers in this situation (see, *Wein v Comptroller of State of N.Y.*, 46 NY2d 394, 399). Moreover, while the Court of Appeals recently accorded plaintiffs standing as voters to challenge financing schemes which are claimed to be subject to voter referendum approval, holding that the right to vote contained in NY Constitution, article VII, Section 11 allows for separate and independent standing to sue, neither NY Constitution, Article VII, Section 8 nor NY Constitution, article X, Section 5 are linked to any voting rights (see, *Matter of Schulz v State of New York*, 81 NY2d 336, *supra*). That being the case, the issue of plaintiffs' standing to maintain these challenges continues to be governed by *Wein v Comptroller of State of N.Y.* (46 NY2d 394, *supra*), *New York State Coalition for Criminal Justice v Coughlin* (64 NY2d 660) and our prior decision in *Matter of Schulz v State of New York* (185 AD2d 596, *appeal dismissed, lv denied* 81 NY2d 336), and, under the principles enunciated therein, plaintiffs cannot proceed." (Plaintiffs' emphasis).

Under the "Questions Presented" portion of Appellants' brief to the Court of Appeals, plaintiffs listed the following

as two of the questions that had been decided in the lower courts and were at issue on the appeal to the Court of Appeals:

" 5. Whether plaintiffs, as citizens-taxpayers and voters, can, under the First Amendment to the federal Constitution and under Article I, Section 9.1 of the New York Constitution, defend their fundamental constitutional right to a preservation of the state's credit and against an erosion of the state's credit, all as guaranteed in Article VII, Section 8 of their State Constitution, by challenging sections 7, 10, 13-15, 16-17, 19, 33-35, 39-40, and 132 of Chapter 56 L93, which give or loan the state's credit to, or in aid of, public corporations of the state?

6. Whether plaintiffs, as citizens-taxpayers and voters, can, under the First Amendment to the federal Constitution and under Article I, Section 9.1 of the New York Constitution, defend their fundamental constitutional right to a life free of payments by them, of state taxes and fees required for the payment by the state, at any time, of any obligations issued by any public corporation, such right being guaranteed by the New York Constitution, Article X, Section 5 -- by challenging sections 7, 10, 13-15, 16-17, 19, 33-35, 39-40, and 132 of Chapter 56 L93, which authorize the state to use taxpayer funds to pay debt-service on the obligations to be issued by public corporations of the state?"

The Court of Appeals held that, "Supreme Court correctly held that the only cognizable challenge to the Act is under Article VII, Section 11...." See Appendix A, page A-6 hereto.

REASONS FOR GRANTING THE WRIT

An important question of federal law which, on information and belief, has never been settled by this Court but now should be, is whether the State Constitution is a principal element of the due process rights of the citizens of that state and whether the federal due process rights of those citizens -- under the Fifth and Fourteenth Amendments to the United States Constitution -- have been violated if those in state governmental power transgress the citizens' debt-limiting protections as expressed in their State Constitution, and those citizens must then pay principal of and interest on that debt through state taxes and fees imposed statewide.

The State Court has, in a very suspicious decision, upheld state sovereignty in a contest against the federal sovereignty. The state Court decision is not only suspect, the case involves an important, substantial, national, public issue worthy of the Court's attention.[5]

The federal question was presented to the state Court in such a manner that it was necessarily decided by the highest state court when it affirmed the constitutionality of the state statute under challenge.

The decision by the state Court should be disturbed by this

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[5] The West Virginia court of last resort, in a case involving a state statute that authorized a state public corporation to issue long term bonds with payment also "subject to the annual appropriation of the legislature" was nullified as violative of West Virginia's constitutional debt limiting provisions. See *Winkler v State of West Virginia School Building Authority*, 434 S.E.2d 420 (W.Va.1993), citing *Ohio Funds Management Board v Walker*, 55 Ohio St.3d 1,8, 561 N.E.2d 927 (1990).

Court because the judgment does not rest on adequate grounds--non-federal or federal. The state Court held that plaintiffs' federal due process rights were not violated, but only after first denying plaintiffs their federal (and state) constitutional right to petition the government for a redress of grievances; it ruled, first, that plaintiffs had no standing to defend two of their constitutional debt-limiting protections (Article X Section 5 and Article VII Section 8).

Not only does the judgment fail to rest on adequate federal grounds, it fails to rest on adequate non-federal grounds. The state Court held that plaintiffs' federal due process rights were not violated, but only after first ruling that state bonds issued under the Act would not be state debt (and, therefore, the constitutional voter referendum requirement of Article VII Section 11 has not been violated) because neither the public corporations under contract to the state to issue the bonds nor the bondholders, themselves, would have any legally enforceable rights to repayment, because the Act said that debt service payments would be "subject to the annual appropriation of the Legislature." Here, the state Court ignored the law and plaintiffs' arguments: (1) that the State Constitution (Article VII Section 7) prohibits any payment out of the treasury of the state, or funds under the management of the state, except in pursuance of appropriations by law and (2) the State Constitution (Article VII Section 16) directs the Legislature to appropriate money to service any and all obligations incurred by the state or on behalf of the state and, if the Legislature should fail to do so, the Comptroller is directed to set aside the next monies flowing into the general fund and to use those monies to pay the obligations.

The Court's judgment is an artfully contrived judgment to say the least.

Supervision by this Court is warranted by the fact that the decision by the Court of Appeals has completely removed customary constitutional "mechanical" or absolute restrictions

against runaway debt, leaving the citizens of the state totally without protection against uncontrolled debt.

It is well known that when it comes to spending and borrowing, legislatures are often short sighted, that they are too quick to discount the future consequences of their actions, and that they cannot be trusted to make appropriate decisions. In no area is mistrust of legislative action more pronounced than when debt is involved. There is an almost irresistible disposition of governments to incur debt to pay for current projects.[6]

It is also well settled that during the nineteenth century, many state legislatures borrowed recklessly, principally to expand canals and railroads and that in response to this legislative profligacy, most state constitutions incorporated provisions limiting legislative power to incur debt.

All but a select few of the State Constitutions include an article on "State finance" and a prominent feature of most state finance articles is a limitation on state debt. And for good reason. Without constitutional provisions on debt, state legislatures would have authority to borrow without limit and would surely repeat history by borrowing recklessly. They view debt as "politically free money."

Debt limitations, unlike some other constitutional provisions are not merely relics of historical crises that have

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[6] See *Schulz, et al. v State of New York, et al.*, 81 NY2d 336 (1993) which reads in part: "The history of state finances and of the State Constitution provide clear evidence of the purport behind these [Constitutional debt-limiting] provisions: Public indebtedness is viewed skeptically by the people of New York and must be tightly circumscribed by the people themselves and not entrusted finally even to their elected representatives." See Appendix K for a copy of the opinion in *Schulz* (supra).

long passed. Instead, they demonstrate that debt limitations are one response to a systemic flaw in democratic processes: an inability to consider adequately the long term impact of current decisions.[7]

It is also well known that the debt-limiting provisions of State Constitutions have been much litigated and that the interplay between legislatures and the courts over these debt-limiting provisions has evolved into different frameworks for checking legislative excess without making it impossible for states to borrow.

In most states, judicial construction has narrowed the apparent force of constitutional limitations on state debt. State courts have acceded to a variety of "escape devices" that permit legislatures to evade constitutional limitations.

While the courts and the legislatures almost inevitably transform formally absolute prohibitions on legislative debt into more flexible constraints, constitutional debt limitations, even if often underenforced, have served effectively to protect against the worst sorts of legislative abuse -- until now, in New York State at least.

By its decision, the New York Court of Appeals has totally eviscerated all three state constitutional debt-limiting provisions. The people have not only been stripped of their state constitutional debt limiting protections but in the process, certain federal constitutional rights have been violated. As it has turned out, the only way the state courts could find for the Executive and Legislative branches on the federal question of a taking of money property through taxes and fees without constitutional due process was to first deny

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[7] "Controlling legislative shortsightedness: The Effectiveness of Constitutional Debt Limitations," 1991 *Wisconsin Law Review*, page 1301 by Stewart E. Sterk and Elizabeth S. Goldman.

citizen-plaintiffs their fundamental right to petition the government and to simultaneously develop a suspect finding of "no enforceable rights, therefore, not state debt."

Unless the Writ is granted by this Court, the citizens of the State of New York will, in effect, have no constitutional debt-limitations to protect them against legislative borrowing and will have lost fundamental federal rights -- the right to petition the government for a redress of grievances against legislative profligacy, debt and oppressive taxation, and against a taking of their property without due process.

Unless this Court grants the Writ and reverses the State Court, thereby reconstituting the checks upon this dangerous power to contract debt, representative government and the Republican Form of Government, as guaranteed by Article IV Section 4 of the United States Constitution, is a dead letter in New York State.[8]

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the opinion and order of the New York State Court of Appeals.

DATED: November 23, 1994
Respectfully submitted,

ROBERT L. SCHULZ,
and others Pro Se
Box 177 Star Route
Glens Falls, New York 12801

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[8] Plaintiffs' children will be paying taxes to retire the debt over which their own representatives had no control, and rather then a system of governance that operates under the Rule of Law, the Rule of Whim will have prevailed.

Appendix A

Opinion and Order of the New York State Court of Appeals Dated June 30, 1994

STATE OF NEW YORK
COURT OF APPEALS

3 No. 137
Robert L. Schulz, et al.,
Appellants,

OPINION

State of New York, et al.,
Respondents,

Robert L. Schulz, for appellants Pro se.
Jerry Boone, for State respondents.
Arthur L. Liman, for respondent Thruway Authority.
Helene Fromm, for respondent MTA.

KAYE, CHIEF JUDGE: This challenge to a 1993 statute authorizing a multi-billion dollar bond issue for State and local transportation improvements continues a debate on financing public works projects that has engaged our State throughout its history. The instant litigation attacks the statute both as imprudent fiscal policy and as violative of debt-limiting provisions of the State Constitution. The wisdom of legislation, of course, is not a matter for the courts. As to legality, we conclude--as did both the trial court and Appellate Division--that the statute before us does

not violate the State Constitution.

I

On April 15, 1993 Governor Mario Cuomo signed into law, as Chapter 56 of the Laws of 1993 ("the Act"), a four-year, $20 billion financing plan for the State's transportation system.

The plan provides $10.47 billion for the Dedicated Highway and Bridge Trust Fund ("Highway Fund") operated by the State Thruway Authority, and $9.56 billion for the Dedicated Mass Transportation Trust Fund ("Mass Transportation Fund"), operated by the Metropolitan Transportation Authority ("MTA").[1] Both Funds, created in 1991, would under the 1993 statute receive revenues--subject to annual appropriation by the Legislature--from taxes and

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[1] The Thruway Authority was created in 1950 by the New York State Thruway Authority Act (Public Authorities Law § 352). It operates and maintains the 641-mile-New York State thruway, as well as New York's 524-mile canal system. In addition, it finances and performs economic development and transportation projects, and since 1972 has through bonds financed State and local highway capital projects.

The MTA was created in 1967 by Public Authorities Law 1263 (City of Rye v MTA, 24 NY2d 627). Through its affiliates and subsidiaries--the New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, the Long Island Rail Road Company, Metro-North Commuter Railroad Company, and the Triborough Bridge and Tunnel Authority--MTA is charged with implementing and operating a unified mass transportation system in New York City and the nearby suburban counties.

fees derived from use of the Authorities' facilities: vehicle registration fees, the motor fuel tax, the petroleum and aviation fuel business tax, and miscellaneous highway use taxes (State Finance Law § 89-b[3]; Tax Law 289-e, 515; Vehicle and Traffic Law § 401; L 1993, ch 56, §§ 16, 31, 33).

The Thruway Authority

The Act authorizes the Thruway Authority to issue up to $4 billion in 30-year bonds for highway and bridge construction.[2] Part of the Highway Fund, therefore, is a special reserve to be used by the Authority for debt service and administrative expenses on its bonds. The bond proceeds, in turn, finance improvements for highways, bridges, railways and aviation facilities. Some of the bonds are to be secured by service contracts and sale-and-leaseback agreements between the Authority and the State (L 1993, ch 56, § § 16, 33).

The Act sets forth several provisos relating to Thruway Authority bonds. Any bonds issued pursuant to authorizations contained in the Act do not constitute a debt of the State. In the words of the Act:

The notes, bonds or other obligations of the authority

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[2] Sections 13 and 14 of the Act authorize the Thruway Authority to issue bonds to finance $1.01 billion over the next four years for local highways and bridges through three programs: (a) the Consolidated Local Highway Assistance Program ("CHIPS") for local highway and bridge projects; (b) the Municipal Streets and Highways Program (Marchiselli); and (c) the Suburban Highway Improvement Program ("SHIPS") for improvements on local and State highways and bridges in the Hudson Valley and on Long Island.

authorized by this section shall not be a debt of the state and the state shall not be liable thereon, nor shall they be payable out of any funds other than those of the authority pledged therefor; and such bonds and notes shall contain on the face thereof a statement to such effect (L 1993, ch 56, § 34; Public Authorities Law § 395[1][d]; see also L 1993, ch 56, §§ 16, 33; Public Authorities Law §§ 386[4], 1269[8]; Highway Law 10-e[5]).

Moreover, the statute in the same section declares that the State has "no continuing legal or moral obligation to appropriate money for payments due" under any agreements entered into to effect the implementation of the goals of the Act.

Restrictions on State liability must be included in any cooperative agreements flowing from the Act:

Each dedicated highway and bridge trust fund cooperative agreement or agreements pursuant to this section shall contain a clause that such agreement or agreements are not a debt of the state and that such agreement or agreements shall be deemed executory only to the extent of the monies available to the state and no liability on account thereof shall be incurred by the state beyond the monies available for the purposes thereof (L 1993, ch 56, § 33; Highway Law 10-e[5]; see also L 1993, ch 56, § 16, 19, 34; Public Authorities Law § § 385[1][d], 386[2]; L 1991, ch 329, § ll[d]). Further, Thruway Authority bonds issued pursuant to the Act are payable only by legislative appropriations from the Highway Fund and no other source:

Such obligations * * * shall be special obligations of the authority secured by and payable solely out of amounts appropriated by the legislature as authorized pursuant to section eight-nine-b of the state finance law without recourse against any other assets, revenues or funds of or any other payments due to the authority (Public Authorities Law § 385[1][c]; L 1993, ch 56, 34; see also Public Authorities

Law § 385[1][d]).

Finally, the Act specifies that the State may assume the obligations of the Authority or substitute State security for the obligations of the Authority only upon constitutional amendment (L 1993, ch 56, § 34; Public Authorities Law § 385[3][10]).

The MTA

With regard to the MTA, the Act sets up a $9.56 billion capital funding program for the five-year period ending December 31, 1996. The existing--but not previously funded--Mass Transportation Fund and the Metropolitan Transportation Operating Assistance Fund would receive appropriations from user-derived taxes and fees and, in turn, would pay into a newly-created MTA Tax Fund (L 1993, ch 56, § 7; Public Authorities Law § 1270-c). Appropriated under the Aid to Localities law as financial assistance for the operations and programs of the MTA, those expenditures are not subject to any restrictions.

The Act does not require the MTA to issue bonds, but if it chooses to do so, it may use the Tax Fund for security and debt service. Any bonds issued by the MTA are subject to the same statutory provisos on State liability as the Thruway Authority bonds. Tax Fund money not used in connection with issuance of bonds can be applied to operating and capital costs of MTA subsidiaries (L 1993, ch 45, §§ 6, 7, 10; Public Authorities Law §§ 1269[12], 1270-c; State Finance Law § 89-c).

Asserting voter standing, plaintiffs commenced this action on May 24, 1993, alleging that the Act misuses public authorities to circumvent constitutional limitations on contracting debt, including the prohibitions against contracting State debt without a public referendum (NY Const, art VII, 11), the lending of credit to public corporations (NY Const, art VII, 8), and assumption of

liability of debt obligation of public corporations (NY Const, art X, § 5).

On cross motions for summary judgment, Supreme Court concluded that under Matter of Schulz v State of New York (81 NY2d 336), plaintiffs lacked standing to challenge the legislation as violative of any constitutional provision other than article VII, section 11 and, on the strength of Wein v City of New York (36 NY2d 610 ["Wein I"]), upheld the statute as constitutional. The Appellate Division affirmed those conclusions, as do we.

II

Because plaintiffs assert voter standing, Supreme Court correctly held that the only cognizable challenge to the Act is under article VII, section 11, the constitutional mandate that State contracts for debt be submitted for public referendum. Plaintiffs contend first that debt contracted by the public authorities is indistinguishable from debt contracted by the State and thus within the referendum requirement. Alternatively, they argue that the Act--by pledging appropriation of public revenues--compromises the legal independence of the public authorities involved, subjecting them to the debt-limiting provisions imposed on the State. They urge moreover, that as a practical matter the Legislature always will appropriate money for the Funds rather than risk damaging the State's credit rating. The effect of long-term appropriation-risk bonds, they say, is to "contract debt" within the meaning of article VII, section 11, and the failure to submit the proposed law to a public referendum renders the enactment unconstitutional.

Before proceeding to an examination of each claim, we note that plaintiffs' burden is a heavy one. It is true that when the main purpose of a statute is to effect " ' indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law'"

(Wein v State of New York, 39 NY2d 136, 145 ["Wein II"], quoting People ex rel Burby v Howland, 155 NY 270, 280). It is also true, however, that enactments of the Legislature--a co-equal branch of government--enjoy a strong presumption of constitutionality. In particular, we give deference to public funding programs essential to addressing the problems of modern life, unless such programs are "patently illegal" (see, Hotel Dorset Co. v Trust for Cultural Resources of City of NY, 46 NY2d 358, 369-370, quoting Comereski v CitY of Elmira, 308 NY 248, 254).

Plaintiffs have not satisfied their burden of proving unconstitutionality beyond a reasonable doubt.

III

In considering plaintiffs' first contention--that the debt of the Authorities is debt of the State--we begin analysis with a history of the referendum requirement and the origin of public authorities.

The State Constitution of 1777, our first, provided that "the legislative power of this state shall be vested in the senate and assembly" (art III, 1). The unlimited grant of legislative authority--when exercised in the arena of borrowing and spending--led to abuses and prompted a movement for reform of State borrowing practices (see, Schulz v State, 81 NY2d 336, 346; People v Westchester County Natl. Bank, 231 NY 465, 471-473). Of particular concern, and the impetus for change, was the lending of public credit to private, "irresponsible" corporations. Following the onset of economic depression in 1837, private railroad corporations defaulted on obligations that had been assumed on the strength of liberally-granted State credit. The State assumed the liabilities, with no hope of reimbursement, and by 1845 more than three-fifths of the entire State debt was the result of such loans. Public works were suspended in response to the debt crisis (see, Wein II,

supra, 39 NY2d at 142-143; 2 Lincoln, Constitutional History of New York, at 87, 100 [1906]).

The precursor to the referendum requirement of article VII, section 11, proposed in 1841 by Assembly Member Arphaxed Loomis of Herkimer County, was adopted under the Constitution of 1846 (former art VII, § 12) as part of a sweeping reform of public borrowing practices, in an effort to protect the State from the uncertain and possibly disastrous consequences of incurring future liabilities--"liabilities easy for a current generation to project but a burden on future generations" (Wein II, supra, 39 NY2d at 144). Known as "the people's resolution," the amendment reserved to voters the power to determine, by referendum, whether a proposed law creating debt would take effect (2 Lincoln, supra, at 73-83). In its present form, the Constitution provides:

> Except the debts specified in sections 9 and 10 of this article, no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for it and against it at such election nor shall it be submitted to be voted on within three months after its passage nor at any general election when any other law or any bill shall be submitted to be voted for or against. The legislature may, at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of further debt or liability under such law (art VII, 11).

Long-term State obligations are the concern of article VII, section 11 (Wein v Levitt, 42 NY2d 300, 304 ["Wein III"]). By article VII, section 9, the State may validly

contract short-term debt in authentic anticipation of the receipt of taxes and revenues, for the purposes and within the amounts of appropriations previously made, if repaid within one year (NY Const, art VII, 5 9; Wein II, supra, 39 NY2d at 146). State debt that extends beyond one year, therefore, is subject to the referendum requirement of article VII, section 11. Simultaneously, a provision was adopted forbidding gifts or loans of State credit to "any individual, association or corporation" (former art VII, § 9).[3]

The referendum requirement is not simply a limit on discretion. In People ex rel Hopkins v Board of Supervisors (52 NY 556), we observed that it was legally impossible for the Legislature to contract debt in the absence of approval by the people through referendum: such approval is a condition precedent to the creation of debt. Any purported long-term debt created in the absence of a public referendum is simply not legally binding on the State.

Following adoption of the referendum requirement, the Legislature sought ways to provide long-term funding for public works projects that would not require public referendum. In 1851, without public referendum, the Legislature authorized issuance of canal certificates, to be paid from canal revenues, which by their terms were not to be deemed to create a debt against the State. While we struck down the statute because it failed to comply with a constitutional mandate as to application of canal revenues (see, Newell v People, 7 NY 9, 92), we noted in passing that even though purchasers of the canal certificates may have no legal remedy against the State if canal revenues proved insufficient to pay the certificates, the State would no doubt

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[3] This prohibition was made binding on cities and other local governments by article 8, section 11 of the 1874 amendments.

make good on them by reason of moral obligation. Moreover, canal revenues paid out to certificate holders represented money that would be diverted from public coffers. The declaration that the certificates were not to be deemed debt was therefore "an evasion if not a direct violation of the constitution" (Newell, supra, 7 NY at 93).

The Legislature then passed a series of town bonding acts that authorized--and later compelled--cities to borrow money to invest in railroad company stock. The question whether the State could authorize one of its instrumentalities to undertake commitments the Constitution prohibited the State itself from undertaking reached this Court in Bank of Rome v Village of Rome (18 NY 38). We upheld the scheme, leading to ratification of constitutional restrictions on municipal debt in 1874, 1884 and 1894.

Shortly after the turn of the century, the Legislature devised a new vehicle for funding public works projects that appeared to insulate the State from the burden of long-term debt: legislative creation of legally separate public benefit corporations, known as public authorities, to discharge particular functions. The first such entity was the Port of New York Authority, created in 1921 (see, Collins v Manhattan & Bronx Surface Tr. Operating Auth. [MABSTOA], 62 NY2d 361, 367). In theory, a public authority would be self-supporting, able to meet debt obligations through revenues obtained from its own valuable assets, such as fares and user fees. Such public benefit corporations would separate their administrative and fiscal functions from those of the State (1929 Opns Atty Gen 223, 224), to "protect the State from liability and enable public projects to be carried on free from restrictions otherwise applicable" (Matter of Plumbing Assn. v New York State Thruway Auth., 5 NY2d 420, 425, citing 1951 Opns Atty Gen 130-132).

We rejected an early challenge to the effectiveness of language disclaiming the State's liability for public authority

debts, where bonds were secured solely by the revenues of the issuing authority (see, Robertson v Zimmermann, 268 NY2d , 62). Although public authority debt was not legally binding on the State, we nevertheless recognized in Williamsburgh Sav. Bank v State of New York (243 NY 231) that the State might choose to honor a liability as a moral obligation. We stated, however, that whether to recognize a moral obligation is within the discretion of the State:

> [I]t rests solely with the State through its Legislature to determine whether it will recognize a claim even though founded upon equity and justice and allow it to be developed into a legal demand and * * * the exercise of this choice cannot be delegated to any one else[.] * * Practically the sole power of the courts in this respect is to determine whether all of the facts established in a given case and presumably within the knowledge of the Legislature do establish such a foundation of equity and justice that the Legislature within the rules established by the courts was authorized, if it saw fit to do so, to recognize the justice of the claim (id., 243 NY at 244-245 [emphasis added]).

In Williamsburgh, the State had indicated its intent to allow enforcement of a moral obligation, permitting judicial determination of a claim (id.; see also Bd. of Supervisors of the County of Cayuga v State of New York, 153 NY 279, 293 [unenforceable moral obligation paid by the State]).

To prevent the State from assuming public authority debt as a moral obligation--and to overrule constitutionally the effect of Williamsburgh--the 1938 Constitution (our present Constitution) explicitly empowered public authorities to issue bonds and incur debt but prevented the State from assuming that liability:

> Neither the state nor any political subdivision thereof

shall at any time be liable for payment of any obligations issued by such a public corporation heretofore or hereafter created, nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision thereof; but the state or a political subdivision thereof may, if authorized by the legislature, acquire the properties of any such corporation and pay the indebtedness thereof (NY Const, art X, § 5; see, Revised Record of the Constitutional Convention of the State of New York 2259-2283; Galie, New York Constitution and Commentary, at 226-228).

To limit proliferation of public authorities, the new Constitution specified that only the Legislature, through special act, could create them (see, City of Rye v MTA, 24 NY2d 627).

Those who spoke in opposition to allowing public authorities expansive discretion in performing formerly State functions were in the minority. Debate at the Constitutional Convention included discussion of whether the State would be liable in the event an authority were unable to meet its obligations, and the language of the amendment was tailored to make clear that it would not. The Chair of the Committee on the Legislature and its Powers, George Fearon, supported the new provision, stating, "I believe that when people buy [authority] bonds they should know definitely and certainly that the credit of the State of New York and of the municipality is not behind those bonds. There should not be any question about it" (Quirk and Wein, A Short Constitutional History of Entities Commonly Known as Authorities, 56 Cornell L Rev 521, 573 [1971], quoting 1938 Revised Record of the Constitutional Convention, supra, 2276).

By article 7, section 8 and article 8, section 1 of the 1938 Constitution, the prohibition against gifts or loans of State credit was made applicable to public corporations (see,

Wein II, supra, 39 NY2d at 144). While the provision bars the State from lending its "credit" to a public corporation, the State is nonetheless free to give money to a public authority and to commit itself to giving future gifts (see, Comereski v CitY of Elmira, 308 NY 248).. The distinction is rooted in the fact that the granting of State money--while depleting current State coffers and making those funds unavailable for other purposes--nevertheless does not bind future generations or create the same dangers of collapse, insolvency and crisis associated with the abuse of credit. Such a distinction presumes, of course, that the State has adequate funds to support a gift (Wein II, supra, 39 NY2d at 154 [Jasen, J., dissenting). The Constitution was adopted by the people on November 8, 1938 at a general election, giving full recognition to the existence of public benefit corporations, their independent capacity to contract debt, and the continued power of the State to make gifts of money to those authorities.[4] Thus, contrary to plaintiffs' contention, there can be no question that--for the purpose of contracting their own legally binding obligations--the Thruway Authority and the MTA are public benefit corporations existing independently of the State (NY Const, art X, § 5; Matter of

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[4] We have consistently recognized public authorities as legal entities separate from the State, enjoying an existence separate and apart from the State, its agencies and political subdivisions (see, e.g., New York Pub. Interest Research Group v New York State Thruway Auth., 77 NY2d 86, 92-93; Methodist Hosp. v State Ins. Fund, 64 NY2d 365; Collins, Supra, 62 NY2d 361, 367; Grace Co. v University Constr. Fund, 44 NY2d 84, 88; Patterson v Carey, 41 NY2d 714; Matter of Dormitory Auth. of State of NY [Span Elec. Corp.], 18 NY2d 114; Matter of Plumbing Assn. v New York State Thruway Auth., 5 NY2d 420, 423-424).

Plumbing Assn. v Thruway Auth., 5 NY2d 420, 424-425; Metropolitan Transp. Auth. v County of Nassau, 28 NY2d 385, 390). [5] Moreover, contracting of debt by public authorities was unquestionably not the aim of the referendum requirement, adopted in 1846, since those entities did not exist at the time.

That the 1938 Constitution expressly empowered public authorities to contract debt independently of the State lends further support to the conclusion that the Act, by authorizing the Thruway Authority and the MTA to issue bonds, does not contract legally binding debt upon the State. The power of the state and these Authorities to engage in this practice has been secured by vote of the people, through article X, section 5 of the Constitution, and any change must come by constitutional amendment. The courts have not made the Constitution and they cannot unmake it (see, Sgaglione v Levitt, 37 NY2d 507, 514).

IV

Though the debt of the Thruway Authority and MTA are not a legal obligation of the State, plaintiffs also contend that the Act contracts debt of the State by imposing a moral

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[5] McCabe v Gross (274 NY 39), holding unlawful the City of Troy's effort to issue bonds through a school district "authority" is not to the contrary. There, we construed the effect of a constitutional provision limiting city debt as extending to debt of city school districts, which are subdivisions of the city. By contrast, the Constitution, through article X, section 5, separates debt of public benefit corporations and that of the State. Public authority bonds are-by constitutional mandate--not legal liabilities of the State.

obligation on the Legislature to continue appropriating revenue to the special Funds. A moral obligation, however, is not in and of itself "debt (see, Firestone Tire & Rubber Co. v Agnew, 194 NY 165, 170)--although it may constitute sufficient consideration to support a promise to pay (see, Meyer v Price, 250 NY 370, 376).[6] Debt, within the contemplation of the State constitutional debt-limiting provisions, has a settled meaning (see, Wein I, supra, 36 NY2d 610), and we are not persuaded that plaintiffs' argument for an expanded definition has merit.

To bring themselves within article VII, section 11, plaintiffs characterize the Act as creating "moral obligation" debt--a term apparently coined in the 1960's to describe appropriation-risk bonds that could not legally bind the Legislature beyond a session but would create a "moral

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[6] A moral obligation cognizable by the State generally falls into one of two classifications. The first are claims involving benefits conferred by private persons upon the State which the State has continued to enjoy without the return of quid pro quo. The second are claims involving injuries and damages wrongfully inflicted upon individuals by those in State service or others for whose acts the State might justly be regarded as responsible (Farrington v State, 248 NY 112, 116). Where a moral obligation exists, the Legislature may use public money to remedy an injustice in cases even though no legal obligation to do so exists, so long as some higher obligation of honor, fairness or broad public responsibility is recognized (Mullane v McKenzie, 269 NY 369). As we recently stated in Matter of Ruotolo v State of New York, moral obligation is properly found where legislative failure to act would be a "travesty of justice" (83 NY2d 248),

obligation" to appropriate money should a public authority be unable to redeem its bonds (see, Quirk & Wein, Rockefeller's Constitutional Sleight of Hand, Empire State Report, November 1975, at 430; see also Tyler, The Steady Growth of Backdoor Financing, Empire State Report, June 1975, at 213, 222). The existence of such a moral obligation would provide some assurance (though not an enforceable legal obligation) to bondholders that the bonds would retain their value.

The bonds authorized by the Act were not labelled "moral obligation bonds" by the Legislature, and entirely apart from nomenclature the Act does not create such an obligation. The Act requires a statement on the face of the bonds that they are not a debt of the State and are payable only out of the Authorities' funds. Moreover, the Act disavows existence of a moral obligation on the part of the State to appropriate revenues in the future. These disclaimers--particularly when read in light of the constitutional prohibition against State assumption of authority debt (NY Const, Article X, § 5)--are sufficient to remove any reasonable expectation on the part of bondholders that the State will guarantee return in the event of default on the part of the Authority or that the bonds place them in privity with the State (see, Mullane v McKenzie, 269 NY 369, 376, rearg denied 270 NY 563 [no moral obligation arises where State acting in accordance with its legal rights]).

Plaintiffs' heavy reliance on Williamsburgh (243 NY 231) as establishing the possibility that the State could be held liable on a moral obligation is unavailing. First--unlike the Act--the statute at issue in Williamsburgh expressly recognized the possibility of a moral obligation. Second, article X, section 5 was adopted after Williamsburgh precisely to overrule constitutionally the possibility of the State assuming a moral obligation as to debt of a public authority.

Most critically, a moral obligation cannot be judicially

imposed upon the State in the absence of its consent to be so bound (see, Williamsburgh, supra, 243 NY at 247). Even where a moral obligation exists, that circumstance creates no enforceable right on behalf of the aggrieved party. Rather, where circumstances support a determination that the State has a valid moral obligation to honor a private claim, we will permit the State to waive immunity from liability. But that is a unilateral right (Ruotolo, supra, 83 NY2d 248; People v Westchester County Natl. Bank, 231 NY 465), and the effect is simply to permit adjudication of a claim.

In short, a moral obligation does not create "debt," since it creates no enforceable right on the part of the one to whom the obligation is owed. Moreover, the Act could not make plainer that the State recognizes no moral obligation on its part to continue appropriations. Plaintiffs' claim that the act creates a moral obligation to pay which falls within the constitutional definition of "debt" therefore also must fail.

V

Plaintiffs point as well to the State's need to protect our economy as binding future legislatures to continue with annual appropriations to the Funds for the life of the bonds. They claim that, in reality, the bonds are backed by the State's full faith and credit because the consequences of default would be ruinous, assuring that appropriations will be made. Indeed, plaintiffs document instances where State officials appear to have characterized the future appropriations as legal obligations of the State, despite the Act's disclaimers. Thus, in plaintiffs' view, the Act obligates the State to continue appropriations for the life of the bonds--some 30 years--creating long-term State "debt."

We have previously held that a proposal to fund in a subsequent year, subject to legislative appropriation and explicit disclaimer, does not create legally binding debt (Lew v McClellan, 196 NY 178, 195-19; see also Public Utility

Dist. No.1 of Lewis County v Washington Public Power Supply Sys., 705 P2d 1195, 1207 [Wash] [WPPS bonds do not constitute legal or equitable pledge upon State]). In People ex rel Hopkins v Bd. of Supervisors (52 NY at 556, 565), we observed that while the Legislature might endeavor to incur future liabilities, to be appropriated on a year-to-year basis without submitting the spending plan to the people, "no harm or loss has or can come from this practice." Such spending plans are effectual only to the extent subsequent legislatures indeed do "give effect to them by providing the means and directing their payment, but the discretion and responsibility is with them as if no former appropriations had been made. No duty or obligation is devolved upon them by the acts of their predecessors. If unaffected by future legislatures, the laws will simply "remain upon the statute books, but * * * only * * * as monuments of the extravagance, recklessness or folly of those by whom they were enacted," creating no legally binding debt or liability upon the State (id. at 565).

Our constitutional limitations, however, have consistently been construed as addressing legally binding debt. As in Wein I, where we upheld subsidies for debt service on bonds issued by the Stabilization Reserve Corporation contingent on annual appropriation, indebtedness is precluded by the very terms of Chapter 56, as well as the prohibition of article X, section 5 against State assumption of authority debt (36 NY2d at 617). We rejected in Wein I the suggestion that a gift of money to a public authority--upheld in Comereski (308 NY at 253-254)-violated the letter or spirit of the constitutional limitations on contracting debt (Wein I, supra, 36 NY2d at 616).

Next, in Wein II (supra, 39 NY2d 136), we upheld a plan giving aid to New York City and the Municipal Assistance Corporation ("MAC") that would be funded through borrowing pursuant to the short-term debt provision of article 7, section 9 as not violating the constitutional

prohibition against giving or lending credit of the State. In Wein III (supra, 42 NY2d 300), a law promising to indemnify State officers from any claims arising from purchase of risky authority bonds was not "borrowing" of any kind, but rather "a contingent cost of doing State business payable routinely out of the general fund" (42 NY2d at 305).

Apart from constituting a line of precedents upon which reliance has been placed in the financial marketplace, these cases established that a contractual obligation on the part of government to make future "gifts" to a special fund created to retire debt of an independent public authority is not offensive to article 7, section 8; article 8, section 1; or article 10, section 5 of the Constitution.

We define "debt" no differently for purposes of article VII, section 11. While the Legislature might make the appropriations to the Funds, to be used in turn to service the Authorities' debt, it is not bound to do so. Should it fail to do so, and the Authority default, the State is not liable to the bondholders under the provisions of the Act. Because the State does not become indebted, the financing subject to appropriation does not constitute the lending of credit or assumption of the liability of a public corporation, or indebtedness of the State for purposes of the constitutional limits on such debt (Wein I, supra, 36 NY2d at 618). Instead, the funds--if appropriated-constitute a permissible gift of money to a public corporation out of existing revenues, creating no debt (NY Const, art VII, 8; Comereski v City of Elmira, 308 NY 248). Laws making annual appropriations from a special fund do not and cannot create debts within the meaning of the referendum requirement (Rockaway Pacific Corp. v Stotesbury, 255 F 345, 348 [NDNY]).

Plaintiffs' third argument therefore must fail as well.

VI

In sum, neutral principles of law and consistent precedents of this Court, upon which decades of commercial transactions have been premised, lead us to uphold the validity of the particular legislation before us. If as plaintiffs urge modern ingenuity, even gimmickry, have in fact stretched the words of the Constitution beyond the point of prudence, that plea for reform in State borrowing practices and policy is appropriately directed to the public arena, where indeed it is now under serious consideration (see, NY Senate Bill S 4359, replacing Assembly Bill 7586 [April 4, 1993]; Joint Press Release of Governor and Comptroller [March 15, 1994]; Opns Atty Gen, May 11, 1993).

We have reviewed plaintiffs' remaining claims, and conclude they lack merit.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

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Order affirmed, without costs. Opinion by Chief Judge Kaye. Judges Simons, Titone, Bellacosa, Smith and Ciparick concur. Judge Levine took no part.

Decided June 30, 1994

Appendix B

Opinion and Order of the New York State Supreme Court Appellate Division, Third Judicial Department Dated October 21, 1993

SUPREME COURT - APPELLATE DIVISION
THIRD DEPARTMENT

Decided and Entered: October 21, 1993 69012

ROBERT L. SCHULZ et al.,
Appellants,

v OPINION AND ORDER

STATE OF NEW YORK et al.,
Respondents.

Calendar Date: September 20, 1993

Before: Weiss, P.J., Mercure, Cardona, Mahoney and Casey, JJ.

Robert L. Schulz, Glens Falls, appellant in person.

Robert Abrams, Attorney-General (Frank K. Walsh of counsel), Albany, for State of New York and others, respondents.

Mudge, Rose, Guthrie Alexander & Ferdon (Douglas M. Parker of counsel), New York City, and Michael A. Vaccari, New York City, for Metropolitan Transportation Authority, respondent.

Paul Weiss Rifkind, Wharton & Garrison (Arthur L. Liman of counsel), New York City, for New York State Thruway Authority, respondent.

Victoria A. Graffeo, Albany, for Clarence D. Rappleyea and others, Members of New York State Assembly, amicus curiae.

Mahoney, J.

Appeal from a judgment of the Supreme Court (Spain, J.), entered July 28, 1993 ln Albany County, which, in an action pursuant to State Finance Law article 7-A, inter alia, granted defendant' motions for summary judgment and made a declaration in their favor.

The principal issue in this appeal is whether certain moral obligation bonds constitute State debt within the meaning of NY Constitution, article VII, § ll.[7] The facts

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[7] Essentially, moral obligation debt is created when the State, through legislation, directs a public authority or other public corporation to issue bonds as a means of financing various public capital improvement projects and then, through outright gift or via a variety of long-term, nonrecourse agreements or capital leases, provides it with the requisite income to secure the bonds and make debt service payments thereon. Because the bonds are secured only by the revenue streams from the agreements or leases and not by

are undisputed. On April 15, 1993, the Legislature enacted by the Laws of 1993 (ch 56) (hereinafter the Act) a comprehensive, four-year $20.9 billion plan for the improvement of the State's infrastructure, namely, the State and local highways and bridges, the metropolitan mass transportation system, and the railways and aviation facilities. While funding for the work was to come partially from Federal assistance and other sources, a large sum was to come from the proceeds of bonds issued by defendants State Thruway Authority and Metropolitan Transportation Authority (hereinafter MTA). In consequence thereof the Legislature included now familiar mechanisms to ensure that the Thruway Authority and MTA had adequate assets to secure the bonds and a sufficient income stream to make subsequent debt service payments.

As regards the MTA bonds, the Act creates the MTA dedicated tax fund (hereinafter the MTA tax fund). It is funded by annual legislative appropriations from that portion of the dedicated mass transportation trust fund which represents tax revenues derived predominantly from supplemental petroleum and aviation business fuel taxes (see, Tax Law § 301-j [d]). The MTA tax fund moneys can be "pledged by [MTA] to secure and be applied to the payment of its bonds, notes or other obligations" and "used for payment of operating costs, and capital costs, including debt service" (public Authorities Law S 1270-c [3], added by L 1993, ch 56, § 7). While the legislation further provides it to

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the full faith and credit of the State, and under the terms of the leases or agreements the State has no legal obligation to appropriate money to make payments, it has no legal liability to the bondholders and effectively divests itself of all but a moral obligation to appropriate the moneys necessary to fund and secure the bonds.

be "the intent of the governor to submit and the legislature to enact" a budget bill for each fiscal year, up to and including the 1996-1997 fiscal year, containing appropriations from the dedicated mass transportation trust fund to the MTA tax fund (State Finance Law S 89-c [3], as amended by L 1993, ch 56, § 10), the appropriation is in the form of a gift of certain tax revenues and is backed up by no legal obligation (State Finance Law S 89-c [3]).

With respect to the Thruway Authority, the Act authorizes that entity to issue bonds at the State's request to finance three types of capital improvements: (l) local highways and bridges, (2) State highways and bridges, and (3) railway and aviation projects. The local highway and bridge bonds are to be secured by the moneys due and owing under service contracts to be entered into between defendant Director of the Division of the Budget and the Thruway Authority (Public Authorities Law § 380 ll] [a]). These service contracts, in turn, must "provide for state commitments to provide annually to the thruway authority a sum or sums * * * to fund, or fund the debt service requirements" of the local highway and bridge bonds (L 1993, ch 56, § 14 [e], [g]). While payments on the service contracts derive from legislative appropriation (L 1991, ch 329, § ll [d]), all contracts must provide that the obligation to make payment thereunder is not a debt of the State, that the contract is "executory only to the extent moneys are available", that "no liability shall be incurred by the state beyond the moneys available for the purpose", and that "such obligation is subject to annual appropriation by the legislature" (L 1991, ch 329, § ll [d]). The bonds themselves are expressly stated to be "special limited obligations" of the Thruway Authority secured by and payable only out of amounts appropriated by the Legislature and these bonds are to contain on their face a statement that they "shall not be deemed to be an obligation of the state and the state shall not be liable thereon" (Public Authorities Law

S 380 [1] [b], [c], added by L 1991, ch 329, § 12).

The State highway and bridge bonds work in a similar fashion, the only difference being the substitution of sale/leaseback arrangements in place of service contracts. Under these agreements, called dedicated highway and bridge trust fund cooperative agreements, in return for the bond proceeds the State transfers title to the land and improvements upon which the work is to be done to the Thruway Authority by quitclaim deed. The Thruway Authority then leases the property back to the State via a long-term capital lease and uses the "rent" payments it receives from the Stats to pay debt service and other related expenses. The "rent" payments are payable solely out of moneys appropriated by the Legislature from the dedicated highway and bridge trust fund (which consists of fuel and highway use tax revenues along with the proceeds of motor vehicle registration fees), and such funds may be pledged by the Thruway Authority to secure the bonds (Public Authorities Law § 385 [l] [c]], added by L 1993, ch 56, § 34). Like the service contracts, the dedicated highway and bridge trust fund cooperative agreements must contain debt and liability disclaimer provisions (Highway Law § 10-3 [5], added by L 1993, ch 56, § 33), and like the local highway and bridge bonds these bonds also must contain a statement that they are not a debt of the State, the State is not liable thereon and payment cannot come from any funds other than those the Thruway Authority pledged for them (Public Authorities Law § 385 [1] [d], added by L 1993, ch 56, § 34)

The railway and aviation bonds are likewise secured and funded by the moneys provided pursuant to a service contract, lease or agreement between the Thruway Authority and various State agencies or municipalities (Public Authorities Law § 386, added by L 1993, ch 56, § 16). The content and terms of service contracts and leases and bonds are the same as those prescribed in connection with State and

local highway and bridge financing (L 1993, ch 56, § 19; see, Public Authorities Law § 386).

Finally, in an ostensible effort to insure that a portion of the transportation-related construction projects were obtainable by small, minority-owned and women-owned businesses, Urban Development Corporation Law § 38 was enacted to permit the Urban Development Corporation to establish a revolving loan fund to provide loans or guarantees to these enterprises (L 1993, ch 56, § 40), and Public Authorities Law § 1838 was enacted creating a State bonding guarantee assistance program to assist the businesses in meeting the payment and/or performance bonding requirements by providing the financial backing needed to induce a surety company to issue construction project bonds (L 1993, ch 56, § 39)

Contending that the foregoing, because it all involves use of legislative appropriations from the general fund or other funds comprised predominantly, if not exclusively, of taxpayer revenue to secure debt, pay debt and provide financial backing to private business violates (1) the NY Constitution, article VII, § 11 proscription against the State contracting debt without voter approval, (2) the NY Constitution, article VII, § 8 prohibition against giving or loaning the State's credit in aid of a public corporation or private enterprise, and (3) the NY Constitution, article X, § 5 prohibition against the State assuming liability for the payment of obligations issued by a public corporation and that the use of State taxes for debt service on bonds issued without voter approval constitutes a violation of due process under the State and federal Constitutions, plaintiffs, all citizen taxpayers and registered voters in the State, commenced the instant action to declare the challenged provisions null and void. Following joinder of issue, all parties moved for summary judgment.

Supreme Court initially concluded that under Matter of Schulz v State of New York (81 NY2d 336), plaintiffs lacked

standing to challenge the legislation as violative of any constitutional provision other than NY Constitution, article VII, § 11. Moreover, of the six challenges under article VII, § 11, the court further found that plaintiffs' third cause of action, challenging as unconstitutional the additional bonding for local highway and bridge improvements, was barred by laches inasmuch as the funding mechanism itself was established in 1991 (L 1991, ch 329, S 11). The remaining challenges were addressed on the merits and, upon review, found to be constitutionally sound. Supreme Court reasoned that the financing mechanisms involved were meaningfully indistinguishable from those upheld by the Court of Appeals in Wein v City of New York (36 NY2d 610). Accordingly, the court granted defendants' motions for summary judgment. This appeal by plaintiffs ensued.

PLAINTIFFS' STANDING TO SUE

As a threshold issue, plaintiffs contend that Supreme Court erred in concluding that they lacked standing to challenge the subject financing provisions as violative of NY Constitution, article VII, § 8 and NY Constitution, article X, § 5. We disagree. Because plaintiffs are challenging the Legislature's authorization of bond issues, they cannot claim statutory standing pursuant to State Finance Law § 123-b. It is equally clear that they have no common-law standing as taxpayers in this situation (see, Wein v Comptroller of State of N.Y., 46 NY2d 394, 399). Moreover, while the Court of Appeals recently accorded plaintiffs standing as voters to challenge financing schemes which are claimed to be subject to voter referendum approval, holding that the right to vote contained in NY Constitution, article VII, § 11 allows for separate and independent standing to sue, neither NY Constitution, article VII, § 8 nor NY Constitution, article X, § 5 are linked to any voting rights (see, Matter of Schulz v State of New York, 81 NY2d 336, supra). That being the

case, the issue of plaintiffs' standing to maintain these challenges continues to be governed by Wein v Comptroller of State of N.Y. (46 NY2d 394, supra), New York State Coalition for Criminal Justice v Coughlin (64 NY2d 660) and our prior decision in Matter of Schulz v State of New York (185 AD2d 596, appeal dismissed, lv denied 81 NY2d 336), and, under the principles enunciated therein, plaintiffs cannot proceed.

LACHES AS BARRING PLAINTIFFS' CHALLENGES TO LOCAL HIGHWAY AND BRIDGE BOND FINANCING MECHANISMS

We likewise agree with Supreme Court that under the additional principles enunciated in MatterofSchulz v State of New York (81 NY2d 336, 347-350, supra), plaintiffs' third cause of action challenging the financing mechanisms for funding local highway and bridge bonds as violative of NY Constitution, article VII, § 11 is barred by laches. While the Act increases the amount of bonds the Thruway Authority is authorized to sell to finance local highway and bridge projects, the financing scheme itself, which is under attack in this cause of action, was not created by that legislation but rather by the Laws of 1991 (ch 329, § ll). This legislation was signed into law and became effective on July 15, 1991. Plaintiffs commenced their action on May 28, 1993, almost two years after the effective date. In the interim, the Thruway Authority has issued bonds to fund the consolidated local highway assistance (hereinafter CHIPS)[8] program and

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[8] CHIPS, which began in 1982, apportions bond proceeds to municipalities to fund capital projects and operating expenses. These apportionments are made up to a year in advance so municipalities, which initially pay the non-Federal cost of the projects, can plan their fiscal affairs in

the municipal streets and highways (hereinafter Marchiselli)[9] program. In reliance on these programs, the municipalities have expended funds and committed themselves to future programs with the expectation that they would be reimbursed. Quite simply, to abort these programs at this point would create severe fiscal problems and cause the same sort of disruption and prejudice which led the court of Appeals to apply the doctrine of laches in Matter of Schulz v State of New York (81 NY2d 336, supra).

CONSTITUTIONALITY OF THE CHALLENGED LEGISLATION

In resolving the constitutional issue of whether moral obligation debt of the sort challenged here is debt "contracted by or in behalf of the state" within the meaning of NY Constitution, article VII, § 11, we begin by noting not only the presumption of constitutionality which attaches to legislative enactments, but also the strength of that presumption in the area of public finance (see, e.g., Wein v Beame, 43 NY2d 326; Wein v city of New York, 36 NY2d 610, supra). Undoubtedly, there is a certain intrinsic validity to plaintiffs' contentions that the challenged financing schemes are little more than carefully tailored mechanisms to circumvent the referendum requirements of NY Constitution, article VII, § 11 (see generally, Restoring Credit and

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anticipation of reimbursement.

[9] The Marchiselli program provides localities with State funds to complement Federal matching grants for local capital infrastructure. In this program, like CHIPS, municipalities undertake the non-federal cost of financing the projects in expectation of reimbursement from State of all but about 5% of the total cost.

Confidence, Report of the Moreland Commission on the Urban Development Corporation and other State Financing Agencies, Mar. 31, 1976, at 113). Likewise, there is a disturbing correctness to their argument that while the State technically is under no legal obligation to appropriate moneys to cover the public authorities' bonds, inasmuch as the public authority would default if the State failed to make these appropriations and such default would affect the State directly by impairing its credit and hampering its ability to issue bonds in the future, the State practically and economically is obligated to make payment. As such, these arrangements have all the earmarks of a long-term State obligation. Be that as it may, however, the inescapable conclusion to be drawn from a reading of applicable precedent on this subject is that such arrangements do not constitute a legal debt of the State.

Despite plaintiffs' arguments to the contrary, we agree with Supreme Court that Wein v City ofNew York (36 NY2d 610, supra) is dispositive of this issue. That case involved creation of the Stabilization Reserve Corporation (hereinafter SRC), which was authorized, upon certification of the Mayor of the City of New York, to issue up to $520 million in bonds and to pay the proceeds to the City Comptroller to be used in the City's general fund. The SRC was the sole obligee on the bonds and debt service was to be payable solely out of the SRC capital reserve fund. Inasmuch as the SRC had no assets or independent source of income, however, moneys in the capital reserve fund were to come from City appropriations or, in the event of the City's default, the State. Although the City and the State earmarked funds for payment into the capital reserve fund, the Court of Appeals specifically found that neither was legally obligated to make any appropriations to fund the SRC debt and, as such, could not be held liable to bondholders in the event of default. Over a vigorous dissent, the majority reasoned that because there was no legal obligation owed by the City to

bondholders, the obligation did not constitute debt within the meaning of NY Constitution, article VIII, S 4.

Simply put, the lesson to be learned from Wein v City of New York (supra) and cases construing it (see, Wein v Levitt, 42 NY2d 300; Wein v State of New York, 39 NY2d 136; New York State Coalition for Criminal Justice v Coughlin, 103 AD2d 40, affd on other grounds 64 NY2d 660; Matter of Schulz v State of New York, 151 Misc 2d 594, mod 185 AD2d 596, appeal dismissed, lv denied 81 NY2d 336; Burns v Egan, 129 Misc 2d 130, affd 117 AD2d 38, appeal dismissed 68 NY2d 806, lv denied 69 NY2d 602) is that in order to constitute debt within the meaning of the State and local finance articles of the NY Constitution, the State or locality must legally be obligated to the bondholders in the event of default. Here, as in Wein v City of New York (supra), the State clearly has no legal liability either on the Thruway Authority's State highway and bridge bonds or the railway and aviation bonds. As noted above, both are expressly denominated to be obligations of the Thruway Authority and are backed up solely by Thruway Authority revenue streams, not by the full faith and credit of the State. This lack of affirmative legal obligation effectively distinguishes this case from Newell v People (7 NY 1) and other cases cited by plaintiffs.

Finally, it is now clear that there is no constitutional violation attendant to the fact that the revenue streams backing up the Thruway Authority bonds derive from State appropriations. It is well established that the State can constitutionally give or lend money to assist a municipal or other public corporation in carrying out a public purpose (see, e.g., Wein v State of New York, 39 NY2d 136, 140, supra). Weiss, P.J., Mercure, Cardona and Casey, JJ., concur. ORDERED that the judgment is affirmed, without costs.

ENTER: Michael J. Novack, Clerk

Appendix C

Decision and Order of the New York Supreme Court, Albany County, Dated July 27, 1993

STATE OF NEW YORK
SUPREME COURT - COUNTY OF ALBANY

ROBERT L. SCHULZ, JOHN SALVADOR, JR., GILBERT O. BOEHM, CHARLES D. BURGE, PHD., LELAND D. RYAN, SUZAN DIANE LA DUE, DOUGLAS FREDERICK WATSON, RICHARD ALLEN BERRY, JOHN B. SIBLEY, JR., CLAUDE F. SPROWLS, GARY L. WILLIAMS, ANDREA VECCHIO, STEPHEN LANDE, ERICK FRENKE, TAI AGUIRRE, EDWARD THOMAS, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and EMANUEL A. CATANUTO,

Plaintiffs-Petitioners,

-against-

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, SENATE PRESIDENT PRO-TEM, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; THE OFFICE OF THE STATE COMPTROLLER, H. CARL MC CALL, COMPTROLLER; THE OFFICE OF THE DIVISION OF THE BUDGET, PATRICK J. BULGARO, DIRECTOR; THE METROPOLITAN TRANSPORTATION AUTHORITY, ROBERT R. RILEY, CHAIRMAN; THE NEW YORK STATE THRUWAY AUTHORITY, PETER TUFO, CHAIRMAN,

Defendants-Respondents.

Supreme Court, Albany County Motion Term
RJI No. 0193 024403

APPEARANCES:

ROBERT L. SCHULZ, et al Plaintiffs-Petitioners appearing Pro Se
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PAUL, WEISS, RIFKIND, WHARTON & GARRISON, Attorneys for The New York State Thruway Authority (ARTHUR L. LIMAN, ESQ., of Counsel), 1285 Avenue of the Americas, New York, NY 10019-6064

DECISION AND ORDER

SPAIN, J.

Plaintiffs are citizen-taxpayers and registered voters in the State of New York. This is an action which seeks a declaratory judgment, pursuant to CPLR 3001, declaring unconstitutional Sections 7, 10, 13, 14, 15, 16, 17, 19, 33, 34, 35, 39, 40 and 132 of Chapter 56 of the Laws of 1993, for alleged violations of three specific sections of the New York State Constitution: Article VII, 11; Article VII, 8; and Article X, 5.

Plaintiffs also seek a preliminary injunction. A temporary restraining order, originally part of an order to show cause dated May 24, 1993, has been since modified and continued pending the outcome of the within motions. Said temporary restraining order prohibits the defendants from issuing any bonds pursuant to the aforementioned sections of Chapter 56 of the Laws of 1993 ("Chapter 56").

The state defendants and The New York State Thruway Authority ("Thruway Authority") have cross-moved for summary judgment. The Metropolitan Transportation Authority (NTA) has cross-moved for a judgment, pursuant to CPLR 3211(a)7, dismissing the complaint for failure to state a cause of action, or in the alternative, pursuant to CPLR 3211(c), for summary judgment.

Plaintiffs have also moved for summary judgment.

THE LEGISLATION

Chapters 329 and 330 of the Laws of 1991 and the statute in question, Chapter 56, provide for and direct funds into a dedicated highway and bridge trust fund ("Highway Trust Fund") and a dedicated mass transportation trust fund ("Mass Transit Trust Fund") which are backed by revenue from monies collected statewide including portions of the gasoline tax, the supplemental petroleum business tax, the highway use tax and certain vehicle registration fees.

Chapter 56 allocates revenues from said dedicated funds for the financing of mass transportation, bridge, and highway projects. The Thruway Authority and the MTA are authorized to issue special limited obligation bonds which are payable from revenues consisting of amounts deposited in the Highway Trust Fund or the Mass Transit Trust Fund respectively and held separate and apart from all other monies of the state. No revenue in the respective trust funds can be disbursed unless an annual appropriation has been made by the State Legislature.

Chapter 56 and legislation already in effect provide that any bonds issued by the specified authorities pursuant to authorizations contained within said chapter shall not constitute a debt of the state [See, for example, L. 1993, ch 56 §§ 16, 33 and 34 and Public Officer's Law §1260(8)]- These bonds, because they reflect a greater risk of non-payment to bondholders, are sometimes called "appropriation-risk" bonds.

PLAINTIFFS' CLAIMS

In their first cause of action the plaintiffs challenge the mechanism in Chapter 56 for backing and financing the bond plan authorized for the MTA. Their challenge is based primarily on three specific sections of the New York State Constitution ("the Constitution"), namely: Article VII, § 11, which states in part:

"...no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law for some single work or purpose, to be distinctly specified therein. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election...";

Article VII, § 8, which states in part:
" The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking...";

and Article X, § 5, which states in part:

"Neither the state nor any political subdivision thereof

shall at any time be liable for the payment of any obligations issued by...a public corporation heretofore or hereafter created, nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision thereof..."

In the next five causes of action the plaintiffs challenge the mechanism for backing and financing the bond programs authorized in the legislation for the Thruway Authority. Their arguments are based upon the same sections of the Constitution.

In their final cause of action the plaintiffs assert that the use of State taxes and fees collected statewide for debt service on bonds without voter approval constitutes a violation of due process under the State and Federal Constitutions.

STANDING ISSUE

The standing of the plaintiffs must first be considered. Historically actions such as these were brought by plaintiffs in their capacity as citizen taxpayers. In WEIN V . COMPTROLLER, 4 6 N.Y.2d 394 (1979) the Court of Appeals held that the exception contained in Section 123-b(1) of the State Finance Law did not apply to citizen taxpayers who were challenging the constitutionality of revenue raising bond legislation. In the same decision the Court also held that there is no common law standing for a citizen taxpayer "to challenge the issuance of State bonds or bond anticipation notes" WEIN V. COMPTROLLER, Id at pages 399 and 400 [See also, NEW YORK STATE COALITION FOR CRIMINAL. JUSTICE V . COUGHLIN, 64 N.Y.2d 660 (1984)].

In a recent decision, MATTER OF SCHULZ V. STATE, 81 N.Y.2d 336 (1993), the Court of Appeals ruled that citizen voters have standing to challenge a statutory

financing provision as an alleged violation of the referendum requirement set forth in Article VII, § 11-of the Constitution. However, the Court left undisturbed its prior rulings that plaintiffs (other than citizen voters) have no standing to challenge a statutory bond authorization.

Therefore, insofar as the plaintiffs in the within action have challenged Chapter 56 on grounds other than Article VII, § 11 of the Constitution, they have no standing to do so. Accordingly, this court will deal with the merits of this action only with respect to plaintiffs' challenge to Chapter 56 as citizen voters as an alleged violation of the Constitution's referendum requirement.

It does not appear that this court's refusal to broaden the scope of the plaintiffs' standing will in any way lessen the impact of plaintiffs' main arguments.

MTA

The plaintiffs contend that Section 7 of Chapter 56 is unconstitutional because it allows the revenues in the Mass Transit Trust Fund (the source of which include the proceeds of state taxes and fees imposed and collected statewide) to secure and be applied to the payment of its bonds and notes issued to fund MTA projects including debt service and principal and interest on debt instruments.

The State defendants and the MTA have responded by asserting that the use of state subsidies paid from the State's general fund to a public authority to secure its bonds does not constitute a debt within the meaning of the constitution so long as such payments are subject to annual appropriation by the Legislature. The MTA further argues that the State's contribution to the fund used by it to secure and service the debts on its bonds remains as it has always been - a gift from the State Legislature, which said body retains the right from year to year to modify, reduce or eliminate this allocation altogether.

THRUWAY AUTHORITY

The plaintiffs claim that the remainder of the challenged sections of Chapter 56, which apply to the Thruway Authority, violate the same debt limitations of the Constitution alleged to have been violated by Chapter 56 with respect to the MTA. The remaining "illegal" provisions of Chapter 56 provide for, among other things: a) allowing the Thruway Authority to issue long term bonds and notes secured by debt service contracts which commit the State to apply revenues deposited in the Highway Trust Fund (the source of which include the proceeds of State taxes and fees imposed and collected statewide); b) title to highways and bridges throughout the state will be conveyed to the Thruway Authority and then leased back to the State with lease payments to be paid out of the Highway Trust Fund; c) the Thruway Authority is authorized to issue 30 year bonds the proceeds of which will be used to rebuild the highways and bridges in all parts of the state; and d) initially appropriating $14.5 million dollars of revenue deposited in the Highway Trust Fund to the State's general debt service fund for payment of principal and interest on bonds issued by the Thruway Authority.

The State defendants and the Thruway Authority have responded by stating that the net proceeds of the Thruway Authority bonds will be used to finance badly needed capital infrastructure improvements throughout the State in return for which the State will pay the Thruway Authority amounts equal to its administrative expenses and debt service but only if the Legislature annually appropriates such amounts.

The main thrust of the defendants' argument is that Chapter 56 expressly states that the Thruway bonds will not be a debt of the State, that the State will not be liable to the bond holders and that the bonds must so indicate. The defendants further assert that Chapter 56 mandates that the agreements between the State and the Thruway Authority are

executory only to the extent that the Legislature appropriates money each year for the payments.

CONSTITUTIONAL ISSUES

The defendants rely heavily on WEIN V. CITY OF NEW YORK, 36 N.Y.2d 610 (1975) ("WEIN I") in support of their argument that Chapter 56 does not violate the Constitution. In WEIN I, plaintiffs sought to declare invalid the legislation creating the New York City Stabilization Reserve Corporation ("SRC"). Plaintiffs in that action claimed that this legislation violated the limitations on the incurrence of municipal debt contained in Article VIII of the Constitution. The Legislature established the SRC during New York City's fiscal crisis in order to provide funds for the City by the issuance of SRC bonds. The proceeds of SRC bonds were to be deposited in the City's general fund and used to pay for essential services of the City.

The SRC's bonds were to be secured by payments required to be made by the City and from the-City's portion of the Stock Transfer Tax and per capita and other State subsidies. The legislation provided that "there shall be paid by the city to the corporation" the amounts necessary to cover debt service. This requirement was subject to the condition that the City first appropriate such amounts. The payment of State subsidies committed to SRC bonds was also subject to appropriation by the State Legislature. The legislation provided that the bonds of SRC would not be a debt of the State or the City.

The Court of Appeals, relying on its decision in COMERESRI V. CITY OF ELMIRA, 308 N.Y. 248 (1955), agreed with the defendants and held, in what plaintiffs describe as a split decision (4-3), that the SRC bonding mechanism did not violate the Constitution.

Plaintiffs, in the within action, urge this court to

distinguish the facts in WEIN I, from the facts in this case and to follow the reasoning of the dissent in WEIN I.

WEIN I is markedly similar to this case. Here, as there, the legislation authorized a public benefit corporation to issue bonds. Here, the law expressly provides that any obligations issued pursuant to the authorization shall not be debt of the State, and that the State cannot be legally liable for them; there, the law provided that neither the State.nor the City could be legally liable. Here, as there, the bonds are payable out of, and the bondholders of the public corporation are entitled to look only to, funds appropriated to and received by the public corporation for that purpose. Here, as there, the State has provided for a special fund to make payments to the public authority, and here, as there, the State is under no obligation to appropriate the funds. Here, the State is "not bound," just as there the City was "not bound. "Here, as there, the very terms of the statute clearly preclude such indebtedness" WEIN I, supra, at p.617.

After a careful review of the legislation in question it is clear that Chapter 56 was tailored carefully so as to adhere to the principles set forth in WEIN I and its progeny. In QUIRK V. MUNICIPAL ASSISTANCE CORP. FOR THE CITY OF NEW YORK, 41 N.Y.2d 644 (1977) and in WEIN V. STATE OF NEW YORK, 39 N.Y.2d 136 (1976) the court upheld basically the same statutory funding mechanisms as existed in WEIN I in which the State assumed certain indemnification obligations subject to annual appropriation [See also, WEIN V. LEVITT, 42 N.Y.2d 300 (1977)]. Such financing mechanisms, like those in Chapter 56 as well as in other state statutes enacted in accord with the principles of WEIN I, provide for long-term obligations for funding capital improvements, require that the obligations specify that they shall not be the debt of the State (or the local government) and that the obligations are payable solely out of annual appropriations that the State (or the local entity) is under no duty to make. Such a formula does not appear to

violate constitutional debt limitations. As stated in WEIN I, "the statutory scheme stays within the letter of the constitution" WEIN I, supra, at p. 619.

Plaintiffs consider Chapter 56 to be yet another example of the State's fiscal irresponsibility which will further undermine the State's economy. The defendants consider Chapter 56 to be a creative way of dealing with the serious fiscal problems related to the upkeep and improvement of the State's highway, bridge and mass transportation systems which are essential to the State's economy and to its people.

"Courts are required to exercise a large measure of restraint when considering highly intricate and imaginative schemes for public financing or for public expenditures designed to be in the public interest. Some may be highly controversial. But when a court reviews such a decision, it must operate on the rule that it may not substitute its judgment for that of the body which made the decision. Judges, however much they might disagree with the act under review, are not free to invalidate it on that ground" HOTEL DORSET V. TRUST FOR CULTURAL RESOURCES OF CITY OF NEW YORK, 46 N.Y.2d 358, 369-370 (1978).

Plaintiffs have a heavy burden in this court in challenging the constitutionality of Chapter 56. "No statute should be declared unconstitutional if by any reasonable construction it can be given a meaning in harmony with the fundamental law" SIMPSON V. WELLS, 181 N.Y. 252, 257 (1905). "Legislative enactments are presumed to be constitutional... While this presumption is rebuttable, unconstitutionality must be proven beyond a reasonable doubt..." MARESCA V. CUOMO, 64 N.Y.2d 242, 250 (1984). Plaintiffs have failed to meet their burden.

The doctrine of stare decisis requires that this court

follow the precedent established in WEIN I. The challenged funding mechanisms contained within Chapter 56 are constitutionally permissible.

DUE PROCESS ISSUE

Plaintiffs allege that Chapter 56 authorizes a "taking" of their property without due process. They assert, in their seventh claim, that funds "otherwise available to reduce plaintiffs' taxes will be unconstitutionally taken from plaintiffs and illegally used to pay the principal and interest on the debt incurred by various state authorities" (paragraph 127 of the complaint). It is clear that the Legislature has the authority to appropriate funds to a public corporation for a public purpose. See, WEIN V. STATE OF NEW YORK, supra, at p. 140. The courts in this state have also held that the Legislature has the authority to dedicate the proceeds of particular taxes to the use of a public corporation. See, QUIRK V. MUNICIPAL ASSISTANCE CORP., supra at pages 647-648. Accordingly, plaintiffs' due process argument must fail.

LACHES ISSUE

Some of the defendants have raised the doctrine of laches. Plaintiffs' third cause of action (Third Claim) challenges those parts of Chapter 56 (Sections 13, 14 and 15) which authorize additional bonding for local highway and bridge improvement programs (CHIPS and Marchiselli programs) which originally became funded through Thruway Authority bonding in 1991 (Section 12 of Chapter 329, of the Laws of 1991). The new bonds authorized by Chapter 56 have not yet been issued.

In reliance on these programs localities have expended funds and committed themselves to programs with the expectation that they will be reimbursed (See, affidavit of

Ralph J. Vecchio, Esq. dated June 11, 1993).

The defendants submit that there is no legitimate reason why the new approach to funding those programs could not have been challenged in 1991. In MATTER OF SCHULZ V. STATE, supra, the Court of Appeals dealt with a similar issue. In that case bonding had been authorized at least a year before the constitutional challenge was commenced. There the court held that laches barred the lawsuit even though some of the bonds had not, as yet, been issued. "The State defendants' arguments persuade us that the time periods involved here do not meet the threshold test in light of the great prejudice certain to be inflicted on the State and its citizens at large when financial transactions of such magnitude and destabilizing impact are at stake and may be upset. Time must be of the essence and here appellants, for all their good faith intentions in acting expeditiously as pro se litigants, did not satisfy that essential ingredient MATTER OF SCHULZ V. STATE, supra, at pages 349 and 350.

The local highway and bridge programs became funded through Thruway Authority bonding in 1991. Plaintiffs' failure to challenge the 1991 funding mechanisms in those programs until May of 1993 bars them from raising these issues in their Third Claim.

CONCLUSION

In view of the foregoing, there being no triable issues of fact, plaintiffs' motion for summary judgment is denied. Defendants' motions for summary judgement are, for all of the foregoing reasons, granted.

Sections 7, 10, 13, 14, 15, 16, 17, 19, 33, 34, 35, 39, 40 and 132 of Chapter 56 of the laws of 1993 are, in all respects, constitutional. Plaintiffs' complaint is, in all respects, dismissed.

Accordingly, the temporary restraining order dated

May 24, 1993 as modified and extended on June 9, 1993 is, in all respects, vacated forthwith.

This memorandum shall constitute both the Decision and Order of this Court.

All papers, including this Decision and Order, are being returned to the Office of the Attorney General on behalf of the attorneys for each of the respective defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section, respecting filing, entry and notice of entry.

SO ORDERED.

DATED at Troy, New York
July 27, 1993

EDWARD O. SPAIN, JSC

Papers Considered:

1) Original Order to Show Cause dated May 24, 1993;
2) Summons and Severed Complaint-Petition dated June 7, 1993;
3) Verified Answer of The New York State Thruway Authority dated June 10, 1993;
4) Notice of Cross-Motion on behalf of The New York State Thruway Authority dated June 11, 1993 and Supporting affidavit of Ralph J. Vecchio, Esq. sworn to June 11, 1993;
5) Answer on behalf of the State of New York defendants dated June 11, 1993 and supporting Affidavits of Dr. Thomas W. Clash and Brian T. Stenson each sworn to June 11, 1993;
6) Notice of Cross-Motion on behalf of the State of New York defendants dated June 11, 1993;
7) Notice of Cross-Motion on behalf of The

Metropolitan Transportation Authority dated June 11, 1993 and supporting Affidavit of Jay H. Walder sworn to on June 11, 1993;

8) Plaintiffs' Cross-Motion for Summary Judgment dated June 15, 1993 and Affidavit of Robert L. Schulz, John Salvador, Jr. and Gilbert O. Boehm sworn to June 15, 1993;
9) Plaintiffs' Affidavit in support of plaintiffs' motion for a preliminary injunction - Affidavit of Robert L. Schulz sworn to June 18, 1993;
10) Amicus Curiae Briefs:
    a) On behalf of Assemblymen Clarence D. Rappleyea, George H. Winner, Jr., John C. Cochrane and John J. Faso filed June 3, 1993;
    b) Brief submitted by Stephen C. Apolito, CPA and Eugene Petrillo, PA each appearing pro-se dated July 7, 1993;
    c) Reply brief on behalf of Assemblymen Rappleyea, Winner, Cochrane and Faso filed June 16, 1993;
11) Letter to Court from Robert L. Schulz dated June 23, 1993 and attachments;
12) Letter from Arthur L. Liman, Esq. dated July 1, 1993 and attachment;
13) Letter from Robert L. Schulz dated July 19, 1993.

Appendix D

Order of the New York State Court of Appeals Denying Plaintiffs' Motion for Reargument, Dated September 1, 1994

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of September, 1994

Present, HON.JUDITH S.KAYE, Chief Justice presiding.

Mo. No. 951

Robert L. Schulz, et al.,
Appellants,

v

State of New York, et al.,
Respondents.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Judge Levine took no part.

Donald M. Sheraw
Clerk of the Court

Appendix E

Chapter 56 of the New York Laws of 1993, Sections 7, 10, 13-15, 16-17, 19, 33-35, 39-40 and 132

STATE OF NEW YORK

S. 4365 A. 7592

1993-1994 Regular Sessions

SENATE - ASSEMBLY

April 5, 1993

IN SENATE -- Introduced by COMMITTEE ON RULES -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

IN ASSEMBLY -- Introduced by COMMITTEE ON RULES -- read once and referred to the Committee on Ways and Means

AN ACT to amend the highway law, the public authorities law, the state finance law, the transportation law, the tax law, and chapter 329 of the laws of 1991 amending the state finance law and other laws relating to the establishment of the dedicated highway and bridge trust fund and the mass transportation trust fund, in relation to providing funding for the state's transportation infrastructure system; and to amend the public authorities law, in relation to creating the bonding guarantee assistance program and the New York State urban development corporation act, in relation to the establishment

of the small business and minority--owned and women--owned business enterprise transportation capital assistance and guaranteed loan program; and making technical alterations which impact upon the expenditure of appropriations and reappropriations

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative intent. The legislature recognizes the importance of sound and balanced transportation infrastructure system to the health of the state's economy and well-being of its residents. During the past decade, over twenty-five billion dollars have been invested statewide in order to address critical transportation infrastructure needs. While significant progress has been made, the legislature recognizes the need for continued investment in order to restore our highway, bridge, transit, air and rail facilities to a state of good

EXPLANATION--Matter (underscored) is new; matter in brackets [ ] is old law to be omitted.

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§ 7. The Public authorities law is amended by adding a new section 1276-c to read as follows:

§ 1270-c. Metropolitan transportation authority dedicated tax fund. 1. The authority shall establish a fund to be known as the "metropolitan transportation authority dedicated tax fund" which shall be kept separate from and shall not be commingled with any other moneys of the authority. The fund shall consist of a "pledged amounts account" and an "operating and capital costs account" and such other accounts and subaccounts as the authority may determine.

2. There shall be deposited, pursuant to appropriation, into the fund the moneys deposited in the dedicated mass transportation trust fund for payment to the metropolitan transportation authority dedicated tax fund pursuant to the provisions of subdivision (d) of section three hundred one-j of the tax law, and any other moneys collected for or transferred to such fund pursuant to section eighty-eight-a of the state finance law and any other provision of law directing or permitting the deposit of moneys in such fund.

3. Moneys in the fund may be (a) pledged by the authority to secure and be applied to the payment of its bonds, notes or other obligations specified by the authority and issued to finance (i) transit projects undertaken for the New York city transit authority and its subsidiaries and (ii) transportation facilities undertaken for the authority and its subsidiaries and (b) used for payment of operating costs, and capital costs, including debt service, reserve requirements, the payment of amounts required under bond and note facilities or agreements related thereto and the payment of all costs related to such obligations, of or for the authority, the New York city transit authority and their subsidiaries as the authority shall determine. To the extent moneys in the fund have been pledged by the authority to secure and pay its bonds, notes or the obligations as herein provided, monies deposited into this fund shall first be deposited into the pledged amount account to the extent necessary to satisfy the requirements of the resolution authorizing such bonds, notes or other obligations. After satisfaction of such requirements of the resolution, or if the authority has not so pledged the moneys in the fund, moneys deposited in the fund shall be directly deposited into the operating and capital costs account and, subject to the provisions of any bond resolutions of the authority not secured by the pledged amounts account, transferred forthwith to or for the benefit of the New York city transit authority and its subsidiaries and the Staten Island

rapid transit operating authority (the "TA") and to and for the benefit of the Long Island Rail Road company and the Metro-North commuter rail road company (the "CRR) as provided in this section.

Moneys in the operating and capital costs account which were deposited in the fund pursuant to appropriation from moneys deposited in the dedicated mass transportation trust fund for payment to the metropolitan transportation authority dedicated mass transportation trust fund for payment to the metropolitan transportation authority dedicated tax fund tax fund pursuant to subdivision (d) of section three hundred one-j of the tax law (the "remaining PBT amount") shall be distributed by authority as follows: an amount equal to the debt service incurred in such calendar year as a result of obligations issued and secured by moneys in the fund, to the extent such debt service is to be paid from moneys deposited in the fund pursuant to appropriation from moneys deposited in the dedicated mass transportation authority dedicated trust fund for payment to the metropolitan mass transportation authority dedicated tax fund pursuant to subdivision (d) of section three hundred one-j of the tax law ("PBT debt service"), shall be added to the remaining PBT amount. That sum of these figures shall be then allocated as follows: eighty-five per centum of such sum shall be allocated to the TA and fifteen per centum of such sum shall be allocated to the CRR. The amounts so allocated shall then be reduced respectively by the proportional amount of PBT debt service attributable to the payments for transit projects undertaken for the TA and transportation facility projects undertaken for the CRR. The remaining amounts shall constitute the respective distributable shares of the remaining PBT amount and shall be distributed to or for the benefit of the TA and CRR.

Moneys in the operating and capital costs account which were deposited in the fund pursuant to section eighty-eight- a of the state finance law (with the "remaining

MMTOA amount") shall be distributed by the authority as follows: an amount equal to the debt service incurred in such calendar year as a result of obligations issued and secured by money in the fund, to the extent such debt service is to be paid from money deposited in the fund pursuant to section eighty-eight-a of the state finance law ("MMTOA debt service"), shall be added to the remaining MMTOA amount. The sum of these figures shall be allocated as follows: there shall be allocated (i) to the TA an amount of such sum which bears the same proportion to such sum as the amount appropriated and paid during such calendar year from the metropolitan mass transportation operating assistance account to the authority for the operating expenses of the TA bears to the total amount so appropriated and paid from such operating assistance account during such calendar year to the TA and CRR combined and (ii) to the CRR an amount of such sum which bears the same proportion to such sum as the amount appropriated and paid during such calendar year from the metropolitan mass transportation operating assistance account to the CRR bears to the total amounts so appropriated and paid from such operating assistance account during such calendar year to the TA and CRR combined. The amounts so allocated shall then be reduced respectively by the proportional amount of MMTOA debt service attributable to the payments for transit projects undertaken for the TA and transportation facility projects undertaken for the CRR. The remaining amounts shall constitute the respective distributable shares of the remaining MMTOA amount and shall be distributed to or for the benefit of the TA and the CRR. In no event shall the authority utilize any measure or calculation for determining such distributable shares other than the formula prescribed herein nor shall the authority take any action which would result in the use of such money which is different from or inconsistent with the use prescribed in this section.

To the extent that amounts described in the preceding

two paragraphs are distributed more frequently than annually, each such distribution shall be made as nearly as may be practicable in accordance with the allocations described above to the TA and the CRR. Within thirty days after the end of each calendar year, the authority shall certify to the director of the budget, the chairperson of the senate finance committee and the chairperson of the assembly ways and means committee, the amount of money deposited in the fund pursuant to appropriation from moneys deposited in the dedicated mass transportation trust fund for payment to the metropolitan transportation authority dedicated tax fund pursuant to subdivision (d) of section three hundred one-j of the tax law and section eighty-eight-a of the state finance law, the amounts expended from the pledged amounts account for the benefit of the TA and CRR, and the amounts of the remaining PBT amount and the remaining MMTOA amount distributed during the prior calendar year to the TA and the CRR and specifying in each case the appropriation or appropriations which was the source of such amounts.

4. Any money deposited in the fund shall be held in the fund free and clear of any claim by any person arising out of or in connection with article thirteen-A of the tax law. Without limiting the generality of the foregoing and without limiting the rights and duties of the commissioner of taxation and finance under article thirteen-A of the tax law, no petroleum business, as defined in section three hundred of the tax law, or any other person, including the state, shall have any right or claim against the authority, any of its bondholders, the TA or the CRR to any moneys in or distributed from the fund or in respect of a refund, rebate, credit or reimbursement of taxes paid under article thirteen-A of the tax law.

§ 10. Subdivision 3 of section 89-C of the state finance law, as added by charter 329 of the laws of 1991, is amended to read as follows:

3. Moneys in the dedicated mass transportation trust fund shall, following appropriation by the legislature be utilized for the reconstruction, replacement, purchase, modernization, improvement, reconditioning, preservation and maintenance of mass transit facilities, vehicles and rolling stock, or the payment of debt service or operating expenses incurred by mass transit operating agencies, and for rail projects authorized pursuant to section fourteen-j of the transportation law, for payments to the general debt service fund of amounts equal to amounts required for service contract payments related to rail projects as provided and authorized by section three hundred eighty-six of the public authorities law and for programs to assist small and minority and women-owned firms engaged in transportation construction and reconstruction projects, including a revolving fund for working capital loans, and a bonding guarantee assistance program in accordance with provisions of this chapter. It is the intent of the governor to submit and the legislature to enact in a budget bill for fiscal year nineteen hundred ninety-four-ninety-five, two appropriations from the dedicated mass transportation trust fund to the metropolitan transportation authority dedicated tax fund established by section twelve hundred seventy-c of the public authorities law. One such appropriation shall be equal to the amounts expected to be available for such purpose pursuant to subdivision (d) of section three hundred one-j of the tax law during the nineteen hundred ninety-four-ninety-five fiscal year and shall be effective in that fiscal year. The other such appropriation shall be equal to the amount expected to be available for such purpose pursuant to subdivision (d) of section three hundred one-j of the tax law during the nineteen hundred ninety-five-ninety-six fiscal year and shall, notwithstanding the provisions of section forty of this

chapter, take effect on the first day of the nineteen hundred ninety-five-ninety-six fiscal year and lapse on the last day of that fiscal year. It is the intent of the governor to submit and the legislature to enact for each fiscal year after the nineteen hundred ninety-four-ninety-five fiscal year in an annual budget bill: (i) an appropriation for the amount expected to be available in the dedicated mass transportation trust fund during such fiscal year for the metropolitan transportation authority pursuant to subdivision (d) of section three hundred one-j of the tax law, including any amounts on deposit therein from any prior year which have been previously appropriated, and (ii) an appropriation of the amounts projected by the director of the budget to be deposited in the metropolitan transportation authority dedicated tax fund from the dedicated mass transportation trust fund pursuant to subdivision (d) of section three hundred one-j of the tax law for the next succeeding fiscal year. Such appropriation for payment of revenues expected to be received in the succeeding fiscal year shall, notwithstanding section forty of this chapter, take effect on the first day of such succeeding fiscal year and lapse on the last day of such fiscal year. If for any fiscal year commencing on or after the first day of April, nineteen hundred ninety-four the governor fails to submit a budget bill containing the foregoing, or the legislature fails to enact a bill with such provisions, then the authority shall notify the comptroller, the director of the budget, the chairperson of the senate finance committee and the chairperson of the assembly ways and means committee of amounts required to be disbursed from the appropriation made during the preceding fiscal year for payment in such fiscal year. In no event shall the comptroller make any payments from such appropriation prior to May first of such fiscal year, and unless and until the director of the budget, the chairperson of the senate finance committee and the chairperson of the assembly ways and means committee have been notified of the required payments and the timing of such

payments to be made from the dedicated mass transportation trust fund to the metropolitan transportation authority dedicated tax fund at least forty-eight hours prior to any such payments. Until such time as payments pursuant to such appropriation are made in full, revenues in the dedicated mass transportation trust fund shall not be paid over to any person other than the metropolitan transportation authority. Nothing contained in this subdivision shall be deemed to restrict the right of the state to amend, repeal, modify or otherwise alter statutes imposing or relating to the taxes imposed pursuant to section three hundred one-j of the tax law or the appropriations relating thereto. The metropolitan transportation authority shall not include within any resolution, contract or agreement with holders of the bonds or notes issued under section twelve hundred sixty-nine of the public authorities law any provision which provides that a default occurs as a result of the state exercising its right to amend, repeal, modify or otherwise alter such taxes or appropriations.

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§ 13. Paragraph (a) of subdivision 1 of section 380 of the public authorities law, as amended by chapter 330 of the laws of 1991, is amended as follows:

(a) The authority is hereby authorized, as additional corporate purposes thereof: (i) to issue bonds and notes and to incur obligations secured by the moneys as provided in the service contracts authorized pursuant to section eleven of the chapter of the laws of nineteen hundred ninety-one which enacted this section; (ii) to make available the proceeds from the sale of such bonds and notes, net of all costs to the authority in connection therewith, for the purposes of financing all or a portion of the capital costs of local highway and bridge projects pursuant to [section] sections ten-c, ten-f and ten-q of the highway law and sections sixteen and sixteen-a of the chapter of the laws of nineteen hundred

ninety-one which enacted this section, and section eighty-b of the highway law and section fifteen of the chapter of the laws of nineteen hundred ninety-one which enacted this section, and (iii) to enter into agreements with the commissioner with respect to financing any such local highways and bridges owned, maintained or operated by a municipality.

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§ 14. Subdivision (a), (e) and (f) of section 11 of chapter 329 of the laws of 1991 amending the state finance law and other laws relating to the establishment of the dedicated highway and bridge trust fund and the dedicated mass transportation trust fund, subdivisions (a) and (f) as amended by chapter 330 of the laws of 1991 and subdivision (e) as amended by chapter 53 of the laws of 1992, are amended to read as follows:

(a) Notwithstanding the provisions of any general or special law to the contrary, and subject to the making of annual appropriations therefor by the legislature, in order to assist the state of New York in the undertaking and financing of local highway and bridge projects as set forth in [section] sections 10-c, 10-f and 10-g of the highway law, and in consideration of the undertaking thereof and benefits to be derived therefrom by the people of the state, the director of the budget is authorized in any state fiscal year to enter into one or more service contracts, none of which shall exceed twenty years in duration with the New York state thruway authority (herein referred to as thruway authority), upon such terms as the director of the budget and the chairman of the thruway authority agree.

(e) Any service contract or contracts for projects subject to section 10-c of the highway law, entered into pursuant to subdivision (a) of this section shall provide for state commitments to provide annually to the thruway authority a sum or sums, upon such terms and conditions as shall be deemed appropriate by the director of the budget, to

fund, or fund the debt service requirements of any bonds or any obligations of the thruway authority issued to fund such projects having a cost not in excess of $146 million in state fiscal year 1991-982 and [§306.4] $1,016.4 million cumulatively by the end of fiscal year [1992-93] 1996-97.

(f) Any service contract or contracts for projects entered into pursuant to subdivision (b) of this section shall provide for state commitments to provide annually to the thruway authority a sum or sums, upon such terms and conditions as shall be deemed appropriate by the director of the budget, to fund, or fund the debt service requirements of any bonds or any obligations of the thruway authority issued to fund such projects having a cost not in excess of $29.2 million in state fiscal year 1991-92 and as so much as may be necessary to meet the state obligation pursuant to the provisions of section 80-b of the highway law in fiscal year 1992-93 and $241.3 million cumulatively by the end of fiscal year 1996-97.

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§ 15. Section 11 of chapter 329 of the laws of 1991 amending the state finance law and other laws relating to the establishment of the dedicated highway and bridge trust fund and the dedicated mass transportation trust fund is amended by adding a new subdivision (g) to read as follows:

(g) Any service contract or contracts entered into for projects subject to sections 10-f and 10-g of the highway law, pursuant to subdivision (a) of this section, shall provide for state commitments to provide annually to the thruway authority a sum or sums, upon such terms and conditions as shall be deemed appropriate by the director of the budget, to fund, or fund the debt service requirements of any bonds or any obligations of the thruway authority issued to fund such projects having a cost not in excess of $140 million cumulatively by the end of fiscal year 1996-97.

§ 16. The public authorities law is amended by adding a new section 386 to read as follows:

§ 386. Additional powers of the authority to issue special rail and aviation transportation bonds. 1. The authority is hereby authorized, as an additional corporate purpose thereof to enter into service contracts, contracts, agreements, deeds, leases with the director of the budget, the commissioner of transportation, municipalities and others to provide for the financing by the authority of rail and aviation transportation projects as authorized by section fourteen-j of the transportation law.

2. The authority is hereby authorized, as an additional corporate purpose thereof, solely at the request of the director of the director of the budget: a. to issue special rail and aviation transportation bonds, notes or other obligations in an aggregate principal amount not to exceed forty million dollars plus a principal amount of bonds, notes or other obligations issued (i) to fund any related debt service reserve fund, (ii) to provide capitalized interest and (iii) to provide fees and other charges and expenses, including but not limited to legal fees, underwriters' discounts, related to the issuance of such bonds, notes and other obligations and the maintenance of such reserves, all as determined by the authority, excluding bonds, notes or other obligations issued to refund outstanding bonds, notes or other obligations issued pursuant to this section. Such bonds, notes or other obligations may be issued for a term not to exceed thirty years and shall be secured by the moneys provided pursuant to a service contract, lease or agreement entered into with the director of the budget, the commissioner of transportation, municipalities or others pursuant to subdivision one of this section for the purpose of financing activities pursuant to section fourteen-j of the transportation law, such service

contract, contract, lease or agreement to provide for the payment of debt service, funding of necessary reserves and all other expenses of the authority as agreed to be the parties, provided, however, that such service contract, contract, lease or agreement shall provide that the obligation of the state to make such payments shall not constitute a debt of the state within the meaning of any constitutional or statutory provision and shall be deemed executory only to the extent of moneys made available to the state, and that no liability on account thereof shall be incurred by the state beyond the moneys available for the purpose thereof and that any obligation to make such payments shall be subject to annual appropriations by the legislature; to make available the proceeds net of all costs to the authority in connection therewith in accordance with such agreements or as authorized and directed by law for the purposes of financing activities pursuant to and in conformance with section fourteen-j of the transportation law.

3. Such obligations shall be issued or incurred with the approval of the director of the budget and shall be special limited obligations of the authority secured and payable solely out of amounts appropriated by the legislature for payments pursuant to a service contract, contract, lease or agreement authorized pursuant to subdivision one of this section and any other funds appropriated by the legislature to the authority therefor without recourse against any other assets, revenues or funds of or other payments due to the authority.

4. Such obligations shall contain on the face thereof a statement to the effect that they shall not be deemed to be an obligation of the state and that the state shall not be liable thereon.

5. All of the provisions of this title relating to bonds and notes, which are not inconsistent with the provisions of this section shall apply to obligations authorized by this section, including but not limited to the power to issue

renewal notes or refunding bonds thereof, provided, however, that the authority shall be authorized to issue variable rate bonds or notes pursuant to this section only until June thirtieth, nineteen hundred ninety-four, after which date not bonds or notes issued by the authority pursuant to this section may have interest rates which vary, provided further that the expiration of such authority shall not affect any such bonds or notes issued prior to such date.

6. The authorization, sale and issuance of bonds, notes or other obligations pursuant to this section shall not be deemed in action as such term is defined in article eight of the environmental conservation law for the purposes of such article. Such exemption shall be strictly limited in its application to such financing activities of the authority and does not exempt the department of transportation or any other entity from compliance with such article.

7. The attorney general shall approve or disapprove of the form of any service contract, contract, lease or agreement authorized pursuant to this section.

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§ 17. The transportation law is amended by adding a new section 14-j to read as follows:

§ 14-j. Special rail and aviation transportation program. The commissioner is hereby authorized to enter into a contract, lease or agreement with the New York State thruway authority for the financing by such authority of special rail and aviation transportation program as authorized by law.

2. The commissioner is hereby authorized to approve funding for the costs for the construction, reconstruction, improvement, reconditioning and preservation of rail freight facilities and for the cost of inter-city rail passenger facilities and equipment. For rail freight projects, the commissioner shall give priority to projects which are coordinated with

community economic development objectives, improve the safety of rail operations, promote intermodal services, provide rail access to relieve highway congestion, provide for the efficient restructuring of urban rail facilities or facilitate the transition of branch lines from large operations to shortline operations. For intercity rail passenger facilities and equipment projects, priority will be given to projects which improve the quality, performance, speed and safety of intercity rail services.

3. The commissioner is hereby authorized to approve funding for the cost of construction, reconstruction, improvement, reconditioning and preservation of municipal airports, privately owned airports and aviation capital facilities, excluding airports owned by the state or operated by a bi-state public benefit corporation, for which federal funding is not available provided projects are part of an approved airport layout plan.

4. The program shall provide forty million dollars to be made available as follows:

	Rail	Aviation
State Fiscal Year 1993-1994	$7.5 million	$2.5 million
State Fiscal Year 1994-1995	$7.5 million	$2.5 million
State Fiscal Year 1995-1996	$7.5 million	$2.5 million
State Fiscal Year 1996-1997	$7.5 million	$2.5 million

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§ 19. (a) Notwithstanding the provision of any general or special law to the contrary, and subject to the making of annual appropriations therefor by the legislature in order to assist the New York State thruway authority (hereinafter referred to as "thruway authority") in the undertaking of and financing of special rail and aviation transportation projects as set forth in section 14-j of the transportation law and in consideration of the benefits to be derived therefrom by the people of the state, the director of the budget is authorized

in any state fiscal year to enter into one or more service contracts, none of which shall exceed thirty years in duration with the thruway authority, upon such terms and conditions as the director of the budget and the chairman of the thruway authority shall agree.

(b) Any service contract entered into pursuant to subdivision (a) of this section and any payments made or to be made thereunder may be assigned and pledged by the thruway authority as security for its bonds and notes.

(c) Any such service contract (i) shall provide that the obligation of the director of the budget or the state to fund or to pay amounts therein provided for shall not constitute a debt of the state within the meaning of any constitutional or statutory provisions in the event the thruway authority assigns or pledges service contract payments as security for its bonds or notes, (ii) shall be deemed executory only to the extent moneys are available and that no liability shall be incurred by the state beyond the moneys available for the purpose, and that such obligation is subject to annual appropriation by the legislature.

(d) any service contracts or contracts for rail and aviation transportation projects entered into pursuant to subdivision (a) of this section shall provide for state commitments to provide annually to the thruway authority issued to fund such rail and aviation transportation projects having a cost not in excess of 40 million dollars cumulatively, by the end of state fiscal year nineteen hundred ninety-six-ninety-seven.

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§ 33. The Highway law is amended by adding a new section 10-e read as follows:

§ 10-e. Additional special powers of the commissioner of transportation. 1. The commissioner of transportation, subject to the approval of the director of the budget, is

hereby authorized to enter into a dedicated highway and bridge trust fund cooperative agreement or agreements with the New York State thruway authority for the financing by such authority of disbursements made by the state for any of the activities authorized pursuant to the provisions of section eighty-nine-b of the state finance law, in any case where the expense thereof is paid in whole or in part by the state. Such disbursements by the state shall be recorded on a project basis and referred to as "dedicated highway and bridge trust fund cooperative agreement disbursements." Copies of such agreement shall be filed with the chairpersons of the assembly ways and means committee and senate finance committee.

2. The dedicated highway and bridge trust fund cooperative agreement or agreements shall provide for dedicated highway and bridge trust fund cooperative agreement payments to the New York state thruway authority, and shall further provide for necessary instruments of transfer by quitclaim deed or otherwise, to the New York State thruway authority pursuant to subdivision eight of this section, of such real property interests that are held by the department in the name of the people of the state for any activities undertaken under this section. Such dedicated highway and bridge trust fund cooperative agreement or agreements shall also include but not be limited to: (a) description and location of each activity; (b) the projected dated of commencement and completion; (c) the estimated total cost, including the amount of federal aid available therefor. Nothing in such agreement shall provide for the transfer of any interests in buildings or personal property, including equipment, materials and facilities used or useful in connection with activities authorized in this section.

3. In addition to the requirements of subdivision two of this section, each such dedicated highway and bridge trust fund agreement or agreements shall provide that: (a) each real property interest transfer pursuant to subdivision eight

shall be maintained and operated under the supervision of the department of transportation without cost to the New York State thruway authority; (b) simultaneously with the conveyance of any real property interest by the department by quitclaim deed or otherwise pursuant to subdivision eight of this section the New York state thruway authority shall issue a use permit or lease to the department of transportation for such real property interest on a toll free basis; and, (c) no such activity shall require dedicated highway and bridge trust fund cooperative agreement payments for a term in excess of thirty years and, at the expiration of such term as the commissioner and the authority may agree, pursuant to subdivision eight of this section all rights and interest of the New York state thruway authority in each such activity shall without any additional payment by the state to such authority revert to and be vested in the people of the state of New York. In no event shall any property transferred to the thruway authority pursuant to this section be deemed part of the thruway for the purposes of any provisions of the tax law.

4. The commissioner of transportation is hereby authorized to undertake any of the authorized activities pursuant to section eight-nine-b of the state finance law, in any case where the expense thereof is paid in whole or in part by the state, as financed by the New York state thruway authority of disbursements made by the state; and, provided that

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§ 34. The public authorities law is amended by adding a new section 385 to read as follows:

§ 385. Additional powers of the authority to issue special dedicated highway and bridge trust fund bonds. 1. (a) The authority is hereby authorized, as an additional corporate purpose thereof: (i) to enter into a dedicated highway and

bridge trust fund cooperative agreement or agreements with the commissioner of transportation for the financing by the authority of disbursements made by the state for any of the activities authorized pursuant to the provisions of section eight-nine-b of the state finance law in any case where the expense thereof is paid in whole or in part by the state; and Iii) to issue use permits or leases to the department of transportation for projects financed by the authority of disbursements made by the state in accordance with the provisions of a dedicated highway and bridge trust fund cooperative agreement or agreements, provided that such projects are maintained and operated under the supervision of the department of transportation without cost to the New York state thruway authority for the full term of such agreement or agreements, and provide further that such use permit or lease shall be granted by the authority on a toll free basis.

(b) The authority is hereby authorized, as additional corporate purposes thereof solely upon the request of the director of the budget: (i) to issue special emergency highway and bridge trust fund bonds and notes for a term not to exceed thirty years and to incur obligations secured by the moneys appropriated from the dedicated highway and bridge trust fund established in section eight-nine-b of the state finance law; (ii) to make available the proceeds in accordance with instructions provided by the director of the budget from the sale of such special emergency highway and bridge trust fund bonds, notes or other obligations, net of all costs to the authority in connection therewith, for the purposes of financing all or a portion of the costs of activities for which moneys in the dedicated highway and bridge trust fund established in section eighty-nine-b of the state finance law are authorized to be utilized or for the financing of disbursements made by the state for the activities authorized pursuant to section eight-nine-b of the state finance law; and (iii) to enter into agreements with the commissioner of

transportation pursuant to section ten-e of the highway law with respect to financing for any activities authorized pursuant to section eighty-nine-b of the state finance law, or agreements with the commissioner of transportation pursuant to sections ten-f and ten-g of the highway law in connection with activities on state highways pursuant to these sections. The authority shall not issue any bonds or notes in an amount in excess of $2.930 billion, plus a principal amount of bonds or notes: (A) to fund capital reserve funds; (B) to provide capitalized interest; and, (C) to fund other costs of issuance. In computing for the purposes of this subdivision, the aggregate amount of indebtedness evidenced by bonds and notes of the authority issued pursuant to section three hundred eighty-five of the public authorities law, there shall be excluded the amount of bonds or notes issued that would constitute interest under the United States Internal Revenue Code of 1986, as amended, and the amount of indebtedness issued to refund or otherwise repay bonds or notes.

(c) Such obligations shall be issued or incurred with the approval of the director of the budget and shall be special obligations of the authority secured by and payment solely out of amounts appropriated by the legislature as authorized pursuant to section eight-nine-b of the state finance law without recourse against any other assets, revenues or funds of or other payments due to the authority. Upon payments of such appropriated amounts from the fund established pursuant to section eighty-nine-b of the state finance law to the account of the authority, such funds may be pledged by the authority to secure its bonds, notes and other obligations authorized by paragraph (b) of this subdivision and shall be held free and clear of any claim by any person arising out of or in connection with articles twelve-A, thirteen-A and twenty-one of the tax law. Without limiting the generality of the foregoing and without limiting the rights and duties of the commissioner of taxation and finance under articles twelve-A, thirteen-A and twenty-one of the tax law, no taxpayer, or

any other person, including the state, shall have any right or claim against the authority or any of its bondholders to any moneys appropriated and transferred from the dedicated highway and bridge trust fund established by section eighty-nine-b of the state finance law for or in respect of a refund, rebate, credit, reimbursement or other repayment of taxes paid under such articles of the tax law.

(d) The notes, bonds or other obligations of the authority authorized by this section shall not be a debt of the state and the state shall not be liable thereon, nor shall they be payable out of any funds other than those of the authority pledged therefor; and such bonds and notes shall contain on the face thereof a statement to such effect. In addition, any agreements entered into by the department of transportation pursuant to sections ten-e, ten-f and ten-g of the highway law or any other entity on behalf of the state to effect the implementation of any of the activities financed in whole or in part with proceeds of the obligations of the authority authorized in this section do not constitute or create a debt of the state, nor a contractual obligation in excess of the amounts appropriated therefor and the state has no continuing legal or moral obligation to appropriate money for payments due under such contracts.

(e) All of the provisions of this title relating to bonds and notes, which are not inconsistent with the provisions of this section, shall apply to obligations authorized by this section, including but not limited to the power to establish adequate reserves therefor and to issue renewal notes or refunding bonds thereof, provided, however, that the authority shall be authorized to issue variable rate bonds or notes pursuant to this section only until June thirtieth, nineteen hundred ninety-four, after which date no bonds or notes issued by the authority pursuant to this section may have interest rates which vary, provided further that the expiration of such authority shall not affect any such bonds or notes issued to such date.

2. Not less than one hundred twenty days before the beginning of each state fiscal year, the chairman of the authority shall certify to the comptroller and to the director of the budget a schedule of anticipated cash requirements for such fiscal year pursuant to any agreements entered into by the authority with the commissioner of transportation pursuant to sections ten-e, ten-f and ten-g of the highway law. The amounts so certified shall constitute required dedicated highway and bridge trust fund cooperative agreement payments due pursuant to such agreements under sections ten-e, ten-f and ten-g of the highway law. The total amount so certified for such fiscal year shall be equal to the total amount of the debt service due or expected to be due during such fiscal year on obligations of the authority incurred pursuant to subdivision one of this section, including payments of interest and principal (including sinking fund payments), together with:

(a) the amount, if any, due to any provider of any insurance policy, letter of credit or other letter of enhancement or a related facility with respect to such obligations, representing payments made by it as provided in the applicable resolution or trust indenture as a result of any previous failure of the state to make any payment provided for in this section, including any related reasonable interest, fees or charges so provided;

(b) the amount, if any, required to restore any applicable reserve fund to the applicable reserve fund requirement to the extent any deficiency therein has resulted directly or indirectly from failure by the state to make any payment provided for in this section;

(c) the amount, if any, required to be debated to the United States to provide for continued exclusion from federal income taxation of interest on obligations of the authority; and

(d) the expenses of the establishment and continued operating expenses of the authority related to the financing of

activities funded with the proceeds of obligations authorized by subdivision one of this section; including, but not limited to, trustees' fees, fees payable to providers of credit facilities, fees for issuing and paying agents, re marketing agents and dealers, legal counsel, financial or other advisors or consultants, independent auditors, rating agencies, transfer or information agents, the publication of advertisements and notices, surety arrangements, and printers' fees or charges incurred by the authority to comply with applicable federal and state securities and tax laws; and any other costs of issuance in excess of the amount provided therefor from the proceeds of the sale of such obligations, to the extent that any of the foregoing amounts or expenses are not to be paid from other resources available to the authority for such purpose.

3. The chairman of the authority may revise such certification at such times as shall be determined by the chairman; provided, however, that the chairman of the authority shall revise such certification not later than thirty days after the issuance of any obligations authorized pursuant to subdivision one of this section including refunding bonds, and affecting the cash requirements of the authority with respect to the obligations incurred pursuant to this section.

4. Such certification shall provide for payments on such dates as the authority and the director of the budget deems appropriate to ensure that sufficient funds will be available from the sources identified in this section to enable it to meet its current obligations with respect to those obligations incurred pursuant to this section as they become due.

5. Upon receipt of such certification, or any revision thereof, the comptroller shall pay such dedicated highway and bridge trust fund cooperative agreement payments to the authority in accordance with such certification, from the dedicated highway and bridge trust fund established by

section eighty-nine-b of the state finance law. Such payments shall be made on or before the date specified in each certificate or within thirty days after such receipt, whichever is later, provided that all such amounts shall have been first appropriated by the state.

6. The agreement of the state contained in this section shall be deemed executory only to the extent of appropriations available for payments under this section and no liability on account of any such payment shall be incurred by the state beyond such appropriations. The state, acting through the director of the budget, and the authority may enter into, amend, modify, or rescind one or more agreements providing for the specific manner, timing, and amount of payments to be made under this section, but only in conformity with this section.

7. The authorization, sale and issuance of bonds, notes or other obligations pursuant to this section shall not be deemed an action as such term is defined in article eight of the environmental conservation law for the purposes of such article. Such exemption shall be strictly limited in its application to such financing activities of the authority and does not exempt the department of transportation or any other entity from compliance with such article.

8. The state of New York shall and hereby agrees to and does indemnify and save harmless the New York state thruway authority from and against any and all liability, loss, damage, interest, judgments and liens growing out of, and any and all costs and expenses (including, but not limited to, counsel fees and disbursement(s) arising out of or incurred in connection with any and all claims, demands, suits, actions or proceedings which may be made or brought against the New York state thruway authority arising out of any determinations made or actions taken or omitted to be taken or compliance with any obligations under or pursuant to this section.

9. Nothing contained in this section shall be deemed

to restrict the right of the state to amend, repeal, modify or otherwise alter statutes imposing or relating to any taxes or fees, including the taxes imposed to section two hundred eighty-four, articles thirteen-A and twenty-one of the tax law and fees imposed by section four hundred one of the vehicle and traffic law. The authority shall not include within any resolution, contract or agreement with holders of the bonds, notes and other obligations issued under this title any provision which provides that a default occurs as a result of the state exercising its right to amend, repeal, modify or otherwise alter any such taxes and fees.

10. Any resolution authorizing bonds, notes or other obligations shall reserve the right of the state, upon amendment of the New York state constitution allowing the issuance, or assumption, of bonds, notes or other obligations secured by revenues, which may include the revenues securing bonds, notes or other obligations of the authority, (i) to assume, in whole or in part, such bonds, notes or other obligations of the authority, in each case only so long as such assumption, extinguishment or substitution is done in accordance with such resolution.

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§ 35. Section 89-b of the state finance law, as amended by chapter 330 of the laws of 1991, is amended to read as follows:

§ 89-b. Dedicated highway and bridge trust fund. 1. There is hereby established in the joint custody of the state comptroller and the commissioner of taxation and finance a special fund to be known as the "dedicated highway and bridge trust fund".

2. The dedicated highway and bridge trust fund shall consist of two accounts: (a) the special obligation reserve and payment account; and (b) the highway and bridge capital account. Moneys in each account shall be kept separate and

not commingled with any other moneys in the custody of the comptroller.

3. (a) The special obligation reserve and payment account shall consist of all moneys required to be deposited in the dedicated highway and bridge trust fund pursuant to the provisions of sections two hundred [and] eighty-nine-e, three hundred one-j and five hundred fifteen of the tax law, section four hundred one of the vehicle and traffic law, and section thirty-one of this chapter which amends this sentence, and any other moneys collected therefor or credited or transferred thereto from any other fund, account or source. [Any interest received by the comptroller on moneys on deposit in the dedicated highway and bridge trust fund shall be retained in and become a part of such fund.]

(b) Moneys in the special obligation reserve and payment account shall, following appropriation by the legislature, be used to pay amounts due to the New York state thruway authority as dedicated highway and bridge trust fund cooperative agreement payments pursuant to the provisions or dedicated highway and bridge trust fund cooperative agreements entered into between the authority and the department of transportation pursuant to sections ten-e, ten-f, and ten-g of the highway law, the provisions of section three hundred eighty-five of the public authorities law, and pursuant to the provisions of this section.

(c) The comptroller is hereby authorized and directed to transfer monthly no later than the last day of each month, any moneys, if any, in excess of the aggregate amounts required to be set aside in order to meet the requirements established in paragraph (d) of this subdivision, to the highway and bridge capital account, provided however that in no event shall such transfers occur unless and until the aggregate of all dedicated highway and bridge trust fund cooperative agreement payments certified to the comptroller for such fiscal year shall have been appropriated in accordance with the provisions of this section. Additionally,

in no event shall the comptroller pay over and distribute any revenues of the fund to any person other than the New York state thruway authority if any payment required to be set aside pursuant to paragraph (b) of this subdivision has not been made to the authority on the date by which it was required to have been made pursuant to such schedule; provided, however, that no person, including such authority or the holders of its bonds or notes shall have any lien on such revenues and such agreement shall be executory only to the extent of such revenues available to the state in such fund.

(d) Upon receipt by the comptroller of a certificate or certificates from the chairperson of the New York state thruway authority submitted pursuant to section three hundred eight-five of the public authorities law, that such authority requires a payment or payments, from the dedicated highway and bridge trust fund, the comptroller shall pay from such fund pursuant to an appropriation on or before the fifteenth day of any month preceding the payment as the chairperson thereof may direct in any such certificate, the amount or amounts so certified./ The chairperson of such authority shall furnish the commissioner of taxation and finance with copies of such certificates. In order to set aside the moneys necessary to meet the amounts required on the payment date or dates herein, the comptroller shall comply with the provisions of this subdivision.

(e) Except for the purpose of meeting a dedicated highway and bridge trust fund cooperative agreement payment required pursuant to section three hundred eight-five of the public authorities law that is due on a monthly basis or more frequently, prior to transferring any moneys from the account pursuant to paragraph (c) of this subdivision, the comptroller shall set aside on a monthly basis all revenues deposited pursuant to this subdivision as received until the amount set aside is equal to, twenty percent of the interest due on such obligations on the next succeeding interest

payment date multiplied by the number of months from the date of the last such payment and ten percent of the next principal installment due on such obligations multiplied by the number of months from the date of the last such principal installment where principal is due on an annual basis or twenty percent of the next principal installment due on such obligations multiplied by the number of months from the date of the last such principal installment where principal is due on a semiannual basis. For the purpose of meeting a required dedicated highway and bridge trust fund cooperative agreement payment that is due on a monthly basis or more frequently, the comptroller shall set aside all revenues deposited pursuant to subdivision two of this section as received until the amount so set aside is, in the reasonable judgment of the comptroller, sufficient to pay the required highway and bridge trust fund cooperative agreement payment on or before such payment date. In no event shall the comptroller be held liable for the failure to set aside an amount sufficient to pay the required dedicated highway and bridge trust fund cooperative agreement payment to the authority.

(f) In the event that the amount set aside by the comptroller pursuant to paragraph (e) of this subdivision is not sufficient to meet the dedicated highway and bridge trust fund cooperative agreement payments required pursuant to a certificate or certificates submitted by the chairperson pursuant to subdivision two of section three hundred eight-five of the public authorities law, the comptroller shall immediately transfer first from the highway and bridge capital account, and then, if necessary, from the general fund to the special obligation reserve and payment account, an amount which, when combined with the amount set aside pursuant to paragraph (e) of this subdivision, shall be sufficient to make the dedicated highway and bridge trust fund cooperative agreement payments required pursuant to such certificate or certificates. Following such an event, the

comptroller shall, immediately set aside the amounts required pursuant to paragraph (e) of this subdivision, set aside and pay the next moneys received by the special obligation reserve and payment account to reimburse the general fund for moneys which were transferred to the special obligation reserve and payment account pursuant to this paragraph. Such amounts shall be set aside until the full amount of moneys transferred from the general fund shall have been set aside and any such moneys set aside shall be transferred to the general fund no later than the last day of each month.

4. The highway and bridge capital account shall consist of all moneys transferred from the special obligation reserve and payment account and any other moneys credited or transferred thereto from any other fund, account or source.

[3.] 5. Moneys in the dedicated highway and bridge trust fund shall, following appropriation by the legislature, be utilized for: reconstruction, replacement, reconditioning, restoration, rehabilitation and preservation of highways, parkways, and bridges thereon, to restore such facilities to their intended functions; construction, reconstruction, enhancement and improvement of highways, parkways, and bridges thereon, to address current and projected capacity problems including costs for traffic mitigation activities; aviation projects authorized pursuant to section fourteen-j of the transportation law and for payments to the general debt service fund of amounts equal to amounts required for service contract payments related to aviation projects as provided and authorized by section three hundred eighty-six of the public authorities law; programs to assist small and minority and women-owned firms engaged in transportation construction and reconstruction projects, including a revolving fund for working capital loans, and a bonding guarantee assistance program in accordance with provisions of this chapter; matching federal grants or apportionments to the state for highway, parkway and bridge capital projects:

the acquisition of real property and interests therein required or expected to be required in connection with such projects; [payments pursuant to any agreement with private engineers, architects, land surveyors or others practicing such professions, in accordance with section fourteen of the transportation law;] preventive maintenance activities necessary to ensure that highways, parkways and bridges meet or exceed their optimum useful life; (expenses associated with the development or construction of such projects up to the amount historically appropriated from the engineering services fund from state sources except such amounts that are reimbursed from the proceeds of the accelerated capacity and transportation improvements of the nineties bond act;) costs of engineering and administrative services of the department of transportation; including but not limited to fringe benefits; the contract services provided by private firms in accordance with section fourteen of the transportation law; personal services and nonpersonal services, for activities including but not limited to the preparation of designs, plans, specifications and estimates; construction management and supervision activities; costs of appraisals, surveys, testing and environmental impact statements for transportation projects; expenses in connection with buildings, equipment and facilities used or useful in connection with the maintenance, operation, and repair of highways, parkways and bridges thereon; and the payment of debt service required on any bonds, notes or other obligations and related expenses for highway, parkway and bridge purposes authorized on or after the effective date of this section: (and such other highway, parkway and bridge purposes as may be authorized by the legislature pursuant to a chapter of the laws of nineteen hundred ninety-one). Beginning with disbursements made on and after the first day of April, nineteen hundred ninety-three, moneys in such fund shall be available to pay such costs or expenses made pursuant to appropriations or reappropriations made during

the state fiscal year which began on the first of April, nineteen hundred ninety-two. Beginning the first day of April, nineteen hundred ninety-three, moneys in such fund shall also be used for payments to the general debt service fund of amounts equal to amounts required for service contract payments as provided and authorized by [sections eleven and twelve of the chapter of the laws of nineteen hundred ninety-one which enacted this] section three hundred eighty of the public authorities law and by section eleven of chapter three hundred twenty-nine of the laws of nineteen hundred ninety-one, as amended.

b. [Beginning] Subject to appropriation therefor and subject to subdivision four of this section, beginning the first day of April, nineteen hundred ninety-three, an amount of moneys in the dedicated highway and bridge trust fund, together with any other moneys legally available therefor, which is equivalent to the amount that was historically appropriated from state sources, other than proceeds from the accelerated capacity and transportation improvements of the nineties bond act, for highway, parkway and bridge purposes as enumerated in paragraph a of this subdivision shall be used to fund highway, parkway and bridge expenditures that were historically appropriated from state sources, other than proceeds from the accelerated capacity and transportation improvements of the nineties bond act, for the purposes enumerated in paragraph a of this subdivision.

(6) All payments of moneys from the dedicated highway and bridge trust fund shall be made on audit and warrant of the comptroller.

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§ 39. The public authorities law is amended by adding a new section 1838 to read as follows:

§ 1838. Bonding guarantee assistance program. 1. There is hereby created a state bonding guarantee assistance

program to enable small businesses, and minority-owned and women-owned business enterprises, certified as a minority-owned or women-owned business enterprise pursuant to article fifteen-A of the executive law, to meet payment and/or performance bonding requirements by providing additional financial backing needed to induce a surety company to issue a bond for construction projects, including but not limited to, government sponsored, transportation related construction projects. For purposes of this section, the term small business shall have the same meaning as defined in section one hundred thirty-one of the economic development law. Such program shall give preference to minority-owned and women-owned business enterprises and shall:

(a) make available funds to surety companies providing bonds to small businesses and minority-owned or women-owned business enterprises in an amount equal to a percentage not to exceed fifty percent of the face value of bonds issued by the surety.

(b) provide technical assistance in completing bonding applications for small businesses and minority-owned or women-owned business enterprises seeking to become eligible for bonding in preparation for bidding on construction projects, including transportation related projects. The authority shall refer such businesses to the department of economic development and the urban development corporation for technical assistance as such businesses may need, including but not limited to:

(i) a review of the applicants' market and business competitive strategy;

(ii) consultation and review of the development and planned implementation of a working capital budget;

(iii) assistance with applications for the receipt of funding from other financial sources and providing referrals to other appropriate public and private sources of financing; and

(iv) assistance from the regional offices of the department of economic development, pursuant to article eleven of the economic development law, and the entrepreneurial assistance program, pursuant to article nine of such law, and any other such program receiving state funds from the department of economic development or the urban development corporation or any other state agency that is intended to provide technical assistance to small businesses and minority-owned and women-owned small business enterprises.

2. Criteria and regulations. (a) The authority shall be rule establish criteria for such program, such criteria to include detailed provisions for eligibility.

(b) The authority shall promulgate rules and regulations to effectuate the purposes of this section which shall be approved by the director of the budget.

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§ 40. Section 1 of chapter 174 of the laws of 1968, relating to enacting the New York state urban development corporation act is amended by adding a new section 38 to read as follows:

§ 38. Small business and minority-owned and women-owned business enterprises transportation capital assistance and guaranteed loan program.

1. To provide financial assistance to small businesses and minority-owned and women-owned business enterprises engaged in government sponsored, transportation related construction projects, the corporation is authorized to establish a small business and minority-owned and women-owned business enterprise transportation capital assistance revolving loan fund which shall provide loans or loan guarantees to small businesses and minority-owned and women-owned business enterprises. For purposes of this section the term small business shall have the same meaning

as defined in section one hundred thirty-one of the economic development law.

2. Such loans, or loan guarantees for loans made by federally and state chartered credit institutions, financial institutions, and federally insured banking organizations to small business and minority-owned and women-owned business enterprises, shall be used to (a) enable such businesses, through the acquisition, leasing or improvement of real property, machinery or equipment, or through the provision of working capital to secure service, commodity or construction contracts; (b) restore working capital to such businesses which have successfully completed work under a contract but whose liquidity has been adversely affected by problems resulting from delayed payments; and (c) ensure the completion of the work associated with a governmental service, commodity or construction contract in order to prevent default on such contract.

3. To be eligible for such loans or loan guarantees (a) a minority-owned and women-owned business enterprise must be certified as a minority-owned or women-owned business enterprise pursuant to article 15-A of the executive law; (b) a small business or a minority-owned and women-owned business enterprise shall have a contract or sub-contract to provide goods or services related to a government sponsored, transportation related construction project.

4. The corporation shall give preference to minority-owned and women-owned business enterprises in making such loans and loan guarantees and shall establish such other criteria as it may deem necessary for this program and for any required amount that shall be held in reserve for any guarantees made under this program.

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§ 132. Notwithstanding any inconsistent provision of law, the comptroller is hereby authorized and directed to transfer immediately from the dedicated highway and bridge

trust fund to the general debt service fund, pursuant to paragraph (a) of subdivision 5 of section 89-b of the state finance law amounts equal to that as set forth in paragraphs (a) and (b) herein below as follows:

(a) $12,000,000 which represents the payment required to be made to the Thruway Authority, pursuant to section 380 of the public authorities law and section 3 of the 1993 debt services budget, to pay principal and interest on Local Highway and Bridge Services contract bonds or notes issued by the authority pursuant to an agreement between the authority and the state: and (b) $2,500.000 which represents the payment required to be made to the Thruway Authority pursuant to section 380 of the public authorities law and section 3 of the 1993 debt services budget, to pay principal and interest on Long Island Suburban Highway Improvement Project bonds and Hudson Valley Suburban Highway Improvement Project bonds and notes issued by such authority pursuant to an agreement between the Thruway Authority and the state.

Appendix F

Plaintiff's Summary of Some of the Challenged Sections of Chapter 56 of the Laws of 1993

Re: Chapter 56, Section 7

Section 7 of the Act is included in Appendix E at pp. A-48 to A-52.

Section 7 of the Act authorizes the application of the proceeds of state taxes and fees imposed statewide, to the payment of the MTA's bonds and notes, in violation of the state constitution's provision prohibiting the state, or any of its subdivisions, from assuming any liability of any obligations of any public corporation -- Article X, Section 5.

Section 7 of the Act authorizes the application of the proceeds of state taxes and fees imposed statewide to secure the payments of the MTA's bonds, thereby making the MTA bonds credit worthy and of "investment grade," in violation of the state constitution's prohibition against lending the state's credit to or in aid of any public corporation -- Article VII, Section 8.

Section 7 of the Act authorizes bonds, notes and other obligations of the MTA and its subsidiaries to be secured by and to be retired using the proceeds of said state taxes and fees imposed statewide, without voter approval; this represents debt contracted by or in behalf of the state without voter approval, in violation of Article VII, Section 11 of the New York Constitution.

RE: Chapter 56, Section 10, 13-15 and 19

Sections 10, 13-17 and 19 of the Act are included in Appendix E at A-53 to A-62.

Sections 10, 13-17 and 19 of the Act authorize the application of the proceeds of state taxes and fees imposed statewide to the payment of the Thruway Authority's bonds in violation of the state constitution's provision prohibiting the state, or any of its subdivisions, from assuming liability of any obligations of any public corporation -- Article X, Section 5.

Sections 10, 13-17 and 19 of the Act authorize the application of the proceeds of said state taxes and fees imposed statewide to secure the payments of the Thruway Authority's bonds in violation of the state constitution's prohibition against lending the state's credit to or in aid of any public corporation -- Article VII, Section 8.

Sections 10, 13 - 17 and 19 of the Act authorizes bonds, notes and other obligations of the Thruway Authority to be issued, to be secured by and to be retired using the proceeds of state taxes and fees imposed statewide, without voter approval; this represents debt contracted by or in behalf of the state without voter approval, in violation of Article VII, Section 11 of the New York Constitution.

RE: Chapter 56, Sections 33-35

Sections 33 - 35 of Chapter 56 are included in Appendix E at pp. A-62 to A-77.

Section 33 of the ACT amends the State Highway Law by adding Section 10-e, which authorizes the Commissioner of the State Department of Transportation ("DOT") "to enter into a Dedicated Highway and Bridge Trust Fund cooperative agreement or agreements with the New York State Thruway Authority for the financing by such Authority of disbursements made by the state ... in any case where the expense thereof is paid in whole or in part by the state." (plaintiffs' emphasis). See Highway Law Section 10-e.1 and 10-e.7.

Section 33 of the ACT requires said cooperative

agreements to provide for payments to the New York State Thruway Authority from the proceeds of state taxes and fees imposed statewide. See Highway Law Section 10-e.2.

Section 33 of the ACT requires said cooperative agreements to provide for necessary instruments of transfer by lease, mortgage or quitclaim deed to the New York State Thruway Authority, of such interest as the people of the state of New York may have in and to any of the people's highways, parkways, roads or other lands, as additional security for the Authority bonds. See Highway Law Section 10-e.2 and 10-e.8. Yet, the ACT requires said lands transferred by DOT to the Thruway Authority to continue to be maintained and operated by DOT without cost to the Thruway Authority. See Highway Law Section 10-e.3(a). The ACT requires the Thruway Authority to issue a less than 30 year lease, for all such lands, to DOT, with lease payments to come from state taxes and fees imposed statewide. See Highway Law Section 10-e.3(b),(c). The ACT requires that at the end of each lease period, all rights and interest of the Thruway Authority in each such activity/land shall, without any additional payment by the state to the Authority, revert to and be vested in the people. See Highway Law Section 10-e.3(c).

Section 33 of the ACT authorizes DOT to undertake activities in any case where the expense thereof is paid by the state, and where the disbursements are to be financed by the Thruway Authority. See Highway Law Section 10-e.4.

Section 33 of the ACT authorizes DOT to pledge and assign to the Thruway Authority taxes and fees imposed on the people of New York State by the federal government, in order to assist the Authority in the Authority's bond financing of expenses and disbursements made by the state. See Highway Law Section 10-e.9.

Section 34 of the ACT amends the Public Authorities Law by adding Section 385, which authorizes the Thruway Authority to "enter into a Dedicated

Highway and Bridge Trust Fund cooperative agreement or agreements with the commissioner of transportation for the financing by the Authority of disbursements made by the state ... in any case where the expense thereof is paid in whole or in part by the state..." and to "issue use permits or leases to the Department of Transportation for projects financed by the Authority of disbursements made by the state...," provided that such projects continue to be maintained and operated by DOT without cost to the Thruway (plaintiffs' emphasis). See PAL Section 385.1(a).

Section 34 of the ACT authorizes the Thruway Authority, without voter approval and solely upon the request of the Budget Director, to issue 30 year bonds and to incur obligations secured by the state taxes and fees imposed statewide and deposited in the Dedicated Highway and Bridge Trust Fund, "for the purposes of financing all or a portion of the costs of activities for which moneys in the dedicated highway and bridge trust fund established in Section 89-b of the State Finance Law are authorized to be utilized or for the financing of disbursements made by the state for the activities authorized pursuant to Section 89-b of the State Finance Law." (Plaintiffs' emphasis). See PAL Section 385.1(b).

Section 34 of the ACT authorizes the Thruway Authority to enter into debt service agreements with DOT to assist the Thruway Authority in its bond financing of any activities authorized by State Finance Law Section 89-b and State Highway Law Sections 10-e, 10-f and 10-9, including DOT's salaries and fringe benefits and including debt service retroactive to 4/1/92. See PAL Section 385.1(b).

Section 34 of the ACT states that said Thruway Authority bonds are to be "special obligations of the Authority secured by and payable solely out of amounts appropriated by the legislature as authorized pursuant to Section 89-b of the State Finance Law without recourse against any other assets, revenues or funds or other payments

due to the Authority," and upon payments of such appropriated amounts from the fund established pursuant to Section 89-b of the State Finance Law to the Authority, "such funds may be pledged by the Authority to secure its bonds, notes and other obligations authorized by paragraph (b of this subdivision..." See PAL Section 385.1(c).

Section 34 of the ACT requires the Thruway Authority to certify to the State Comptroller and State Budget Director, not less than 4 months prior to the beginning of each fiscal year, a schedule or state funds required for such fiscal year pursuant to al 1 the debt service agreements entered into between the Thruway Authority and DOT pursuant to State Highway Law Sections 10-e, 10-f and 10-9. "The amounts so certified shall constitute required dedicated highway and bridge trust fund cooperative agreement payments due pursuant to such agreements under Section 10-e, 10-f and 10-g of the highway law. The total amount so certified for such fiscal year shall be equal to the total amount of debt service due or expected to be due during such fiscal year on obligations of the Authority incurred pursuant to subdivision one of this section, including payments of interest and principal..." See PAL Section 385.2.

Section 34 of the ACT requires said certification by the Thruway Authority to include the full amount of any debt service payments made by any provider of an insurance policy "as a result of any previous failure of the state to make any payment provided for in this section...." (plaintiffs' emphasis). See PAL Section 385.2(a).

Section 34 of the ACT requires said certification by the Thruway Authority to include the full amount of any deficiency in any applicable debt service reserve fund resulting "from failure by the state to make payment provided for in this section." See PAL Section 385.2(b).

Section 34 of the ACT requires said certification by the Thruway Authority to include the amount, "required

to be rebated to the United States to provide for continued exclusion from federal income taxation of interest on obligations of the Authority." See PAL Section 385.2(c). This would represent an unconstitutional use of public resources for private purposes. (Article VII, Section 8, New York Constitution).

Section 34 of the ACT requires the Comptroller to make the payments within thirty days of receipt of said certification, from the proceeds of state taxes and fees imposed statewide and deposited in the Dedicated Highway and Bridge Trust Fund. See PAL Section 385.5.

Section 34 of the ACT states that the Thruway Authority shall be held harmless from and against all liability and costs growing out of any lawsuit brought against the Authority as a result of their activity under PAL Section 385. (Plaintiffs will argue that this represents an unconstitutional lending of the state's credit to a public corporation. Article VII, Section 8, New York Constitution).

Section 35 of the ACT amends State Finance Law Section 89-b. Section 35 of the ACT requires moneys in the Dedicated Highway and Bridge Trust Fund be used to pay amounts due to the Thruway Authority under said cooperative debt service agreements, to pay the principal and interest on the Thruway Authority bonds issued pursuant to Sections 10-e, 10-f and 10-9 of the highway law and PAL Section 385. See SFL Section 89-b.3(b).

Section 35 of the ACT directs the Comptroller to pay from state taxes and fees imposed statewide and deposited in the Dedicated Highway and Bridge Trust Fund, according to said certification received from the Thruway Authority pursuant to PAL Section 385.2. See SFL Section 89.b.3(d).

Section 35 of the ACT authorizes the state Comptroller to transfer money from the state's General Fund to the Dedicated Highway and Bridge Trust Fund and from there to the Thruway Authority if the amount of money

in the Dedicated Highway and Bridge Trust Fund is insufficient to meet the debt-service obligations of the Thruway Authority as certified by the Thruway under PAL Section 385.2. See SFL Section 89-b.3(f).

Section 35 of the ACT authorizes moneys in the Dedicated Highway and Bridge Trust Fund to be used for payments to the general debt service fund of amounts required for debt service contract payments related to aviation projects authorized by PAL Section 386 and for programs to assist small and minority and women-owned firms, including working capital loans and a bonding guarantee assistance program. See SFL Section 89-b.5.

Section 35 of the ACT authorizes the use of the proceeds of state taxes and fees, as deposited in the Dedicated Highway and Bridge Trust Fund to secure Thruway Authority bonds issued to finance "costs of engineering and administrative services of the Department of Transportation, including but not limited to fringe benefits the contract services provided by private firms in accordance with section fourteen of the transportation law; personal services and non personal services for activities including but not limited to the preparation of designs, plans, specifications and estimates;construction management and supervision activities; costs of appraisals, surveys, testing and environmental impact statements for transportation projects; expenses in connection with buildings, equipment and facilities used or useful in connection with the maintenance, operation, and repair of highways, parkways and bridges thereon; and the payment of debt service required on any bonds, notes or other obligations and related expenses for highway, parkway and bridge purposes authorized on or after the effective date of this section. Beginning with disbursements made on and after the first day of April, nineteen hundred ninety-three, moneys in such fund shall be available to pay such costs or expenses made pursuant to appropriations or reappropriations made during

the state fiscal year which began on the first of April, nineteen hundred ninety-two. Beginning the first day of April, nineteen hundred ninety-three, moneys in such fund shall also be used for payments to the general debt service fund of amounts equal to amounts required for service contract payments as provided and authorized by section three hundred eighty of the public authorities law and by section eleven of chapter three hundred twenty-nine of the laws of nineteen hundred ninety-one, as amended. See SFL Section 89-b.5(a).

Applying the proceeds of state taxes and fees imposed statewide to the payment of the Thruway Authority's bonds and notes violates the constitutional provision prohibiting the state, or any of its subdivisions, from assuming the liability of the debt obligations of any public corporation -- Article X, Section 5.

Using the proceeds of state taxes and fees imposed statewide to secure the payments of the Thruway Authority's bonds and notes violates the constitutional prohibition against lending the state's credit to or in aid of any public corporation -- Article VII, Section 8.

Bonds, notes and other obligations of the Thruway Authority and its subsidiaries, that are secured by and to be retired using the proceeds of state taxes and fees imposed statewide, without voter approval, represent debt contracted by or in behalf of the state without voter approval, in violation of Article Vll, Section 11 of the New YorK Constitution.

Appendix G

New York State's 1993-1994 Debt Service Appropriation Bill Signed Into Law April, 1993

NOTE: Italics is Plaintiffs' Emphasis

SENATE-ASSEMBLY - January 19, 1993

IN SENATE - A BUDGET BILL, submitted by the Governor pursuant to article seven of the constitution - read twice and ordered, printed, and when printed to be committed to the Committee on Finance - committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee - committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee.

IN ASSEMBLY - A BUDGET BILL, submitted pursuant to article seven of the constitution - read once and referred to the Committee on ways and means - committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee.

AN ACT making appropriations for the *legal requirements of the state debt service and lease purchase payments and other special contractual obligations*, and to provide for the payment by the commissioner of the office of general services on certificates of participation.

the people of the state of New York, represented in the senate and assembly, do enact as follows:

Section 1. The several sums specified in this section, or so much thereof as may be sufficient to accomplish in full the

purposes designated by the appropriations are hereby appropriated from the general fund - state purpose account, and are made available for the fiscal year beginning April 1, 1993.

GENERAL FUND - STATE PURPOSES ACCOUNT

Maintenance undistributed

For the legal requirements of debt service on tax and revenue anticipation notes, bond anticipation notes and short-term series notes, in accordance with the following schedule.....36,879,000

EXPLANATION - Matter Underscored is new; matter in brackets is old law to be omitted.

Debt Service 1993-1994

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Debt Service Fund - General Debt Service Fund - 311

Maintenance undistributed:

For the *legal requirements of debt service on serial bonds, lease purchase payments, and special contractual obligation payments* in accordance with the following schedule....1,590,410,000

SCHEDULE

PRINCIPAL AND INTEREST ON SERIAL BONDS

The sum of $727,380,000, or so much thereof as may be necessary, is hereby appropriated for payment by the state comptroller of principal and interest on serial bonds issued in connection with higher education construction, pure waters, environmental quality, transportation capital

facilities, rail preservation, outdoor recreation development, energy conservation through improved transportation, parks and recreation land acquisition, rebuild New York through transportation infrastructure renewal and accelerated capacity and transportation improvements of the nineties during fiscal year 1993-94.....727,380,000

LEASE PURCHASE PAYMENTS

The several sums, or so much thereof as may be sufficient to accomplish in full the purposes designated by the appropriations, are hereby appropriated and are, subject to the issuance of certificates of approval of availability by the director of the budget, available for the purpose of making lease purchase payments for the fiscal year beginning April 1, 1993, in accordance with the following sub-schedule.....50,534,000

sub-schedule

For payment to the county of Albany as rentals in accordance with sections 4.05 and 4.06 of the South Mall Agreement as executed between the county of Albany and the state providing for construction of additional state facilities in the city of Albany.....40,648,000

For supplemental payments to the county of Albany in accordance with section 2.06 of the South Mall Agreement executed between the county of Albany and the state providing for construction of additional state facilities in the city of Albany.....1,229,000

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DEBT SERVICE 1993-94

Medical Care Facilities Finance Agency Act, as

amended, which provide that the service contract payments will be made to meet the debt service payments due if the funds and accounts established under the bond resolution, the secured hospital special debt service reserve fund, and the secured hospital capital reserve fund are inadequate.

No expenditures may be made from this appropriation until the chairman of the medical care facilities finance agency has certified to the comptroller and the director of the budget the amounts necessary to meet then current debt service payments. Upon receipt of such certification, the director of the budget shall cause to be prepared a certificate of approval for the amount certified. Copies of such certificate of approval shall be filed with the comptroller and the chairmen of the senate finance committee and the assembly ways and means committee. Such certificate may be amended from time to time and such amendments shall be filed with the comptroller and the chairmen of the senate finance committee and the assembly ways and means committee.....53,284,000

For payment to the State University Construction Fund, for payment to the Dormitory Authority, pursuant to paragraph (e) of subdivision 19 of section 1680 of the public authorities law, to pay principal and interest on bonds or notes issued by such authority, pursuant to an agreement between the State University Construction Fund, State University of New York and the Dormitory Authority, relating to State University education facilities.....248,000,000

For payment to the Dormitory Authority, pursuant to subdivision 2 of section 1680-e of the public authorities law, to pay principal and interest on bonds or notes issued by such authority relating to the State University athletic facilities.....2,250,000

For payment to the *Thruway Authority*, pursuant to section 380 of the public authorities law, to pay principal and interest on *Local Highway and Bridge Service Contract bonds*

or notes issued by such authority pursuant to an agreement between

the Thruway Authority and the State. The comptroller is hereby authorized and directed to transfer immediately from the Dedicated Highway and Bridge Trust Fund to the general Debt Service Fund, Pursuant to paragraph a of subdivision 3 of section 89-b of the state finance law as set forth in chapter 330 of the laws of 1991, and amount equal to such payments.....36,388,000

For payment to the *Thruway Authority*, pursuant to section 380 of the public authorities law, to pay principal and interest on *Local Highway and Bridge Service Contract bonds or notes* issued by such authority pursuant to an agreement between the Thruway Authority and the State.....12,000,000

For payment to the *Thruway Authority*, pursuant to section 380 of the public authorities law, to pay principal and interest on *Long Island Suburban Highway Improvement Project bonds and notes Hudson Valley Suburban Highway Improvement Project bonds and notes* issued by such authority pursuant to an agreement between the Thruway Authority and the State.....2,500,000

For payment to the Environmental Facilities Corporation to pay principal and interest on bonds or notes issued by such authority pursuant to an agreement between the Environmental Facilities Corporation and the Office of Parks, Recreation and Historic Preservation. The comptroller is hereby authorized and directed to transfer immediately from the state parks infrastructure fund to the general debt service fund an amount equal to such payment.....2,000,000

For payment to the Environmental Facilities Corporation, pursuant to subdivision 1 of section 1290 of the public authorities law, to pay principal and interest on bonds

or notes issued by such authority pursuant to a lease agreement between the Environmental Facilities Corporation and the Office of Parks, Recreation and Historic Preservation relating to the financing of Riverbank State Park.....5,000,000

the amounts received in the mental health services fund as a result of the investment of the moneys deposited therein that will or may have to be rebated to the federal government pursuant to the provisions of the internal revenue code of 1986, as amended. Notwithstanding the provisions of section 40 of the state finance law or any other provision of law to the contrary, this appropriation shall remain in full force and effect until July 31, 1994.....191,506,000

The sum of $1,559,050,000, or so much thereof as may be necessary, is hereby appropriated for transfer by the state comptroller to the mental hygiene patient income account notwithstanding the provision of any other law during fiscal year 1993-94.....1,559,050,000

The sum of $17,300,000, or so much thereof as may be necessary is hereby appropriated for transfer by the state comptroller to the mental hygiene patient income account notwithstanding the provisions of any other law during fiscal year 1993-94.....17,300,000

Total of schedule.....1,767,856,000

§ 9. The sum specified in this section, or so much thereof as may be sufficient to accomplish in full the purposes designated by the appropriation, is hereby appropriated *from the emergency highway reconditioning and preservation fund*, and is made available for the fiscal year beginning April 1, 1993.

DEBT SERVICE FUND-EMERGENCY HIGHWAY RECONDITIONING AND PRESERVATION FUND-320

The sum of $30,000,000, or so much thereof as may be necessary, is hereby appropriated for payment by the state comptroller to the *New York State Thruway Authority* for the purpose of meeting the terms of any contractual agreements between the commissioner of transportation and the New York state thruway authority.

On or before the thirtieth day next preceding the date upon which payment shall be made under a *cooperative highway contractual agreement* between the commissioner of transportation and the New York state thruway authority, the commissioner of taxation and finance shall certify to the director of the budget, the commissioner of transportation and the chairman of the New York state thruway authority the amount of such payment to be made under a cooperative highway contractual agreement. Upon receipt of such certification from the commissioner of taxation and finance, the director of the budget shall cause to be prepared a certificate of approval of availability to enable the payment from the emergency highway reconditioning and

preservation fund to the New York state thruway authority; provided, however, that the maximum amount to be paid shall not exceed the amount available in such fund for such payment pursuant to the provisions of section 89 of the state finance law.

Notwithstanding the provisions of any general or special law to the contrary, no portion of the appropriation shall be available for the purpose designated until a certificate of approval of availability shall have been issued by the director of the budget and a copy of such certificate filed with the state comptroller and the chairmen of the

senate finance committee and the assembly ways and means committee. Such certificate may be amended from time to time subject to the approval of the director of the budget and a copy of each such amendment shall be filed with the state comptroller and the chairmen of the senate finance committee and the assembly ways and means committee.....30,000,000

§ 10. The sum specified in this section, or so much thereof as may be sufficient to accomplish in full the purposes designated by the appropriation, is hereby appropriated from the *emergency highway construction and reconstruction fund*, and is made available for the fiscal year beginning April 1, 1993.

DEBT SERVICE FUND-EMERGENCY HIGHWAY CONSTRUCTION AND RECONSTRUCTION FUND

The sum of $30,000,000, or so much thereof as may be available and necessary, is hereby appropriated for payment by the state comptroller to the New York state thruway authority for the purpose of meeting the terms of any cooperative highway contractual agreements between the commissioner of transportation and the New York state thruway authority.

On or before the thirtieth day next preceding the date upon which payment shall be made under a cooperative of transportation and the *New York state thruway authority*, the commissioner of taxation and finance shall certify to the director of the budget, the commissioner of transportation and the chairman of the New York state thruway authority the amount of such payment to be made under a *cooperative highway contractual agreement*. Upon receipt of such certification from the commissioner of taxation and finance, the director of the budget shall cause to be prepared a certificate of approval of availability to enable the payment from the emergency highway construction and reconstruction fund to the New York state thruway authority; provided,

however, that the maximum amount to be paid shall not exceed the amount available in -

Total of schedule.....320,500,000

In the event that the amount set aside by the comptroller pursuant to paragraph (b) of subdivision 5 of section 92-r of the state finance law is not sufficient to fully pay debt service or required payments when due, the comptroller shall immediately transfer from the general fund to the local government assistance tax fund an amount which, when combined with the amount set aside pursuant to paragraph (b) of subdivision 5 of section 92-r of the state finance law, shall be sufficient to meet the payments required by the certificate or certificates.

§ 12. The sum specified in this section, or so much thereof as may be sufficient to accomplish in full the purposes designated by the appropriation, is hereby appropriated from the school capital facilities financing reserve fund, and is made available for the fiscal year beginning April 1, 1993.

DEBT SERVICE FUND-SCHOOL CAPITAL FACILITIES FINANCING RESERVE FUND

The sum of $4,934,000, or so much thereof as may be necessary, is hereby appropriated for payment by the state comptroller to the Dormitory Authority for the purpose of meeting the terms of any contractual agreements between the participation Special Act School Districts and the Dormitory Authority.....4,934,000

§ 13. The sum specified in the section, or so much thereof as may be sufficient to accomplish in full the purposes designated by the appropriation, is hereby

appropriated from *the dedicated highway and bridge trust fund*, and is made available for the fiscal year beginning April 1, 1993

DEDICATED HIGHWAY AND BRIDGE TRUST FUND
SPECIAL OBLIGATION RESERVE AND
PAYMENT ACCOUNT

The sum of $15,000,000, or so much thereof as may be necessary, is hereby appropriated to pay principal and interest on bonds or notes as required under dedicated highway and bridge trust fund cooperative agreements executed during state fiscal year 1993-94 under section 10-e of the highway law.....15,000,000

Appendix H

New York State's 1994-1995 Debt Service Appropriation Bill Signed Into Law April 15, 1994

NOTE: Italics is Plaintiffs' Emphasis

SENATE - ASSEMBLY

January 18, 1994

IN SENATE - A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution - read twice and ordered printed, and when printed to be committed to the Committee on Finance - committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

IN ASSEMBLY - A BUDGET BILL, submitted pursuant to article seven of the Constitution - read once and referred to the Committee on Ways and Means - committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT making appropriations for the *legal requirements of the state debt service and lease purchase payments and other special contractual obligations*, and to provide for the payment by the commissioner of the office of general services on certificates of participation

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The several sums specified in this section, or so much thereof as may be sufficient to accomplish in full

the purposes designated by the appropriations, *are hereby appropriated from the general fund - state purposes account, and are made available for the fiscal year beginning April 1, 1994.*

GENERAL FUND - STATE PURPOSES ACCOUNT

Maintenance undistributed

For the legal requirements of debt service on bond anticipation notes and short-term series notes, in accordance with the following schedule...9,635.000

SCHEDULE

INTEREST ON BOND ANTICIPATION NOTES AND SHORT-TERM SERIES NOTES

EXPLANATION - Matter in (underscored) is new; matter in brackets [ ] is old law to be omitted.

Page 8

For payment to the State University Construction Fund, for payment to the Dormitory Authority, pursuant to paragraph (e) of subdivision 19 of section 1680 of the public authorities law, to pay principal and interest on bonds or notes issued by such authority, pursuant to an agreement between the State University Construction Fund, State University of New York and the Dormitory Authority, relating to State University education facilities...266,000,000

For payment to the State University Construction Fund, for payment to the Dormitory Authority, pursuant to paragraph (e) of subdivision 19 of section 1680 of the public authorities law, to pay principal and interest on bonds or

notes issued by such authority, pursuant to an agreement between the State University Construction Fund, State University of New York and the Dormitory Authority, relating to State University education facilities...10,000,000

For payment to the Dormitory Authority, pursuant to subdivision 2 of section 1680-e of the public authorities law, to pay principal and interest on bonds or notes issued by such authority relating to the State University athletic facilities...2,250,000

For payment to the *Thruway Authority, pursuant to section 380 of the public authorities law, to pay principal and interest on Local Highway and Bridge Service Contract bonds or notes issued by such authority pursuant to an agreement between the Thruway Authority and the State...61,200,000*

For payment to the Thruway Authority, pursuant to section 380 of the public authorities law, to pay principal and interest on Long Island Suburban Highway Improvement Project bonds and notes Hudson Valley Suburban Highway Improvement Project bonds and notes issued by such authority pursuant to an agreement between the Thruway Authority and the State...2,500,000

Page 14

For payment to the Environmental Facilities Corporation to pay principal and interest on bonds or notes issued by such authority pursuant to an agreement between the Environmental Facilities Corporation and the Office of Parks, Recreation and Historic Preservation...1,520,000

Debt service payments...387,100,000
Expenses and continued operations...2,900,000

Total of schedule...390,000,000

§ 12. The sum specified in this section, or so much thereof as may be *sufficient* to accomplish in full the purposes designated by the appropriation, is hereby appropriated from the school capital facilities financing reserve fund, and is made available for the fiscal year beginning April 1, 1994.

SCHOOL CAPITAL FACILITIES
FINANCING RESERVE FUND - 130

The sum of $5,495,000, or so much thereof as may be necessary, is hereby appropriated for payment by the state comptroller to the Dormitory Authority for the purpose of meeting the terms of any contractual agreements between the participating special act school districts and the dormitory authority...5,495.000

§ 13. The sum specified in this section, or so much thereof as may be sufficient to accomplish in full the purposes designated by the appropriation, is hereby appropriated from the dedicated highway and bridge trust fund, and is made available for the fiscal year beginning April 1, 1994.

DEDICATED HIGHWAY AND BRIDGE TRUST FUND
SPECIAL OBLIGATION RESERVE AND PAYMENT
ACCOUNT - 072

The sum of $58,000,000, or so much thereof as may be necessary, is hereby appropriated to pay principal and interest on bonds or notes as required under dedicated highway and bridge trust fund cooperative agreements executed during state fiscal year 1994-95 under section 10-e of the highway law...58,000,000

STATE - ASSEMBLY

January 18, 1994

IN SENATE - A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution - read twice and ordered printed, and when printed to be committed to the Committee on Finance

IN ASSEMBLY - A BUDGET BILL, submitted pursuant to article seven of the Constitution - read once and referred to the Committee on Ways and Means

AN ACT *to authorize the financing of local highway and bridges and rail and aviation programs*

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The sum of $255,000,000, or so much thereof as may be available, is *hereby appropriated, in accordance with subdivision 1 of section 380 of the public authorities law as amended by chapter 56 of the laws of 1993*, according to the following schedule. Payments pursuant to subdivision (a) of this section shall be made available as moneys become available for such payments. Payments pursuant to subdivisions (b) and (c) of this section shall be made on the fifteenth day of June, September, December and March or as soon thereafter as moneys become available for such payments. Payments pursuant to subdivisions (d), (e) and (f) of this section shall be made on a quarterly basis, or as soon thereafter as moneys become available for such payments. No moneys of the state in the state treasury or any of its funds shall be available for payments pursuant to this section:

SCHEDULE

(a) $35,000,000 to municipalities for repayment of eligible costs of federal aid municipal street and highway projects pursuant to section 15 of chapter 329 of the laws of 1991 as added by section 9 of chapter 330 of the laws of 1991, as amended. The department of transportation shall provide such information to the municipalities as may be necessary to maintain the federal tax exempt status of any bonds, notes, or other obligations issued by such municipalities to provide for the non-federal share of the cost of projects pursuant to chapter 330 of the laws of 1991 or section 80-b of the highway law.

EXPLANATION - Matter in (underscored) is new; matter in brackets [ ] is old law to be omitted.

(b) $102,462,000 to counties, cities, towns and villages for reimbursement of eligible costs of local highway and bridge projects pursuant to section 16 of chapter 329 of the laws of 1991 as added by section 9 of chapter 330 of the laws of 1991, as amended. Notwithstanding the provisions of any general, or special law the amounts distributed to each municipality in accordance with this paragraph shall be adjusted so that such amounts will not be less than 70.66 percent of the "funding level" as defined in subdivision 5 of section 10-c of the highway law for each such municipality. In order to achieve the objectives of this paragraph, to the extent necessary, the amounts in excess of 70.66 percent of the funding levels to be distributed to each municipality under this paragraph shall be reduced in equal proportion.

(c) $72,538,000 to counties, cities, towns and villages for reimbursement of eligible costs of local highway and bridge projects pursuant to section 16-a of chapter 329 of the laws of 1991 as added by section 9 of chapter 330 of the

laws of 1991, as amended.

(d) *$12,500,000 for repayment to municipalities for the eligible costs of the Long Island suburban highway improvement program authorized by section 10-f of the highway law, as added by chapter 56 of the laws of 1993. The director of the budget shall certify to the New York state thruway authority the amount of bonds, notes or other obligations for this purpose to be sold pursuant to section 380 of the public authorities law as amended by chapter 56 of the laws of 1993.*

(e) $22,500,000 for repayment to municipalities for the eligible costs of the Hudson Valley suburban highway improvement program authorized by section 10-g of the highway law, as added by chapter 56 of the laws of 1993. The director of the budget shall certify to the New York state thruway authority the amount of bonds, notes or other obligations for this purpose to be sold pursuant to section 380 of the public authorities law as amended by chapter 56 of the laws of 1993.

(f) $10,000,000 for the repayment to eligible entities for the costs of the special rail and aviation transportation projects authorized by section 14-j of the transportation law, as added by chapter 56 of the laws of 1993. The director of the budget shall certify to the New York state thruway authority the amount of bonds, notes, or other obligations for this purpose to be sold pursuant to section 386 of the public authorities law as amended by chapter 56 of the laws of 1993.

§ 2. Section 3-b of chapter 53 of the laws of 1993, enacting the aid to localities budget, as amended by section 10 of chapter 259 of the laws of 1993, section 16 of chapter 53 of the laws of 1992, enacting the aid to localities budget, as amended by chapter 53 of the laws of 1993, section 5 of chapter 53 of the laws of 1992, enacting the aid to localities budget, as amended by chapter 53 of the laws of 1993 and section 16-b of chapter 329 of the laws of 1991 as amended

by chapter 53 of the laws of 1993 shall continue in force and effect.

§3. This act shall take effect April 1, 1994.

Appendix I

Opinion and Order of the New York Court of Appeals, Dated February 6, 1979, Denying Leon Wein Standing to Challenge an Act of the Legislature as Repugnant to Certain Debt-Limiting Provisions of the State Constitution

LEON E. WEIN, Appellant, v COMPTROLLER OF THE STATE OF NEW YORK et al., Respondents.

Argued January 8, 1979; decided February 6, 1979 .

SUMMARY

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 9, 1978, which unanimously affirmed an order and judgment of the Supreme Court at Special Term (BERNARD NADEL, J.; opn 93 Misc 2d 652), entered in New York County, granting defendant's motion to dismiss the complaint for lack of standing.

Plaintiff commenced the action as a citizen taxpayer seeking a declaratory judgment that certain bond anticipation notes issued by the State were issued in violation of the State Constitution. Special Term granted defendants' motion to dismiss the complaint holding that article 7-A of the State Finance Law denies a taxpayer standing to maintain an action with respect to the issuance of State bonds or bond anticipation notes.

The Court of Appeals affirmed the order of the Appellate Division, holding, in an opinion by Judge WACHTLER, that a citizen taxpayer does not have standing

to challenge the constitutionality of the issuance of State bond anticipation notes as subdivision 1 of section 123-b of the State Finance Law, which grants a citizen taxpayer standing with respect to State expenditures, does not apply to revenue raising, therefore there is a reasonably clear legislative intent to prevent taxpayer challenges in these cases and it would be inappropriate for the courts to confer standing since such a determination would, in effect, render that portion of the statute a nullity.

Wein v Comptroller of State of N. Y., 61 AD2d 903, affirmed.

HEADNOTES

Parties--Standing to Challenge State Bond Anticipation Notes

1. Subdivision 1 of section 123-b of the State Finance Law, which grants a citizen taxpayer standing to maintain an action with respect to State expenditures, does not apply to revenue raising; accordingly, a citizen taxpayer cannot claim standing to challenge the constitutionality of the issuance of State bond anticipation notes under the statute.

Parties - Standing to Challenge State Bond Anticipation Notes

2. A citizen taxpayer does not have standing to challenge the constitutionality of the issuance of State bond anticipation notes under the rule adopted in Boryszewski v Brydges (37 NY2d 361), which permits a citizen taxpayer to test the constitutionality of a State statute authorizing the expenditure of state money, despite the fact that the Legislature in enacting article 7-A of the State Finance Law authorizing citizen-taxpayer actions specifically disclaimed any intent to abridge or alter rights of action or remedies now or hereafter existing (State Finance Law , §123-i); in suits not covered by subdivision 1 of section 123-b of the State Finance Law which grants a citizen taxpayer standing

to maintain an action with respect to State expenditures, the question of standing is to be resolved by the courts under common-law principles and since Election 123-b does not apply to taxpayer suits involving revenue raising through State bonds and bond anticipation notes, there is a reasonably clear legislative intent to prevent taxpayer challenges in these cases and it would be inappropriate for the courts to confer standing since such a determination would, in effect, render that portion of the statute a nullity.

POINTS OF COUNSEL

Leon Edward Wein, pro se, and William J. Quirk for Leon E. Wein, appellant. Plaintiff-appellant, as a citizen taxpayer, has standing to sue the State of New York claiming that it is incurring bonded indebtedness in violation of the Constitution. (*Boryszewski v Brydges*, 37 NY2d 361; *St. Clair v Yonkers Raceway*, 13 NY2d 72; *Wein v City of New York*, 36 NY2d 610; *Wein v State of New York*, 39 NY2d 136; *New York Public Interest Research Group v Carey*, 42 NY2d 527; *Wein v Carey*, 41 NY2d 498.)

Robert Abrams, Attorney-General (Jean M. Coon of counsel), for respondents. I. This action is barred by article 7-A of the State Finance Law. (*Boryszewski v Brydges*, 37 NY2d 361; *Wein v City of New York*, 36 NY2d 610; *Wein v State of New York*, 39 NY2d 136; *Wein v Carey*, 41 NY2d 498; *New York Public Interest Research Group v Carey*, 42 NY2d 627.) II. In any event, the complaint fails to state a cause of action.

OPINION OF THE COURT

WACHTLER, J.

The question on this appeal is whether a citizen

taxpayer has standing to challenge the constitutionality of the issuance of State bond anticipation note.

In December, 1976 the plaintiff, Leon Wein, commenced this action as a citizen taxpayer seeking a declaratory judgment that 74 million dollars in bond anticipation notes issued by the State in March of that year were issued in violation of the State Constitution. Specifically he claimed that the notes had been issued to finance a 1975-1976 State deficit and that this practice, characterized as "back bonding", is prohibited by sections 11 and 12 of article VII of the State Constitution. In addition to demanding a declaration that the practice is unconstitutional, the complaint requests an injunction precluding the defendants "from issuing any further back-bonding debt."

The defendants moved to dismiss on the ground, among others, that a taxpayer who, like the plaintiff, had not purchased any of the notes and is not otherwise personally aggrieved by their issuance, lacks standing to challenge the constitutionality of the procedure employed. Special Term granted the motion and dismissed the complaint holding that article 7-A of the State Finance Laws denies a taxpayer standing to maintain an action with respect to the issuance of State bonds or bond anticipation notes. The Appellate Division affirmed for the reasons stated at Special Term.

On this appeal, taken as of right on the ground that a constitutional question is presented (CPLR 5601, subd [b], par 1), the only issue involves the plaintiff's right or standing to maintain the action. The plaintiff argues that our decision in *Boryszewski v Brydges* (37 NY2d 361), established a broad right of standing on behalf of taxpayers to seek judicial review of governmental action which is said to be unconstitutional; that article 7-A of the State Finance Law, although enacted after *Boryszewski*, does not alter or abridge

the right judicially created and that cases from this court, decided before the enactment of the statute (citing *Wein v City of New York*, 36 NY2d 610) and afterwards (citing *Wein v State of New York*, 39 NY2d 136; *Wein v Carey*, 41 NY2d 498; *New York Public Interest Research Group v Carey*, 42 NY2d 527) have recognized the right of a taxpayer to challenge the issuance of bonds or anticipation notes.

In the *Boryszewski* case we held that a citizen and taxpayer can maintain an action "to test the constitutionality of a State statute authorizing the expenditure of State moneys" (*supra*, at p 363). That determination, expanding a taxpayer's standing to sue, was not based on any constitutional right of standing. The only constitutional principle bearing on the standing issue was the doctrine of separation of powers which had previously been asserted negatively to bar taxpayers' suits. Under prior law it was held that the courts lacked the power to "interfere" with the "acts of another department of government" except to determine "the individual rights of the parties" and that a taxpayer's interest in the expenditure of State moneys was not sufficiently direct or immediate for him to be considered an aggrieved party (*Schieffelin v Komfort*, 212 NY 520, 530, 537; *St. Clair v Yonkers Raceway*, 13 NY2d 72). Thus the recognition in *Boryszewski* of the taxpayer's legitimate and significant interest in State expenditures did not call for the recognition of a new constitutional right of standing but rather the abandonment of an old constitutional impediment to standing in these cases (see, e.g., *St. Clair v. Yonkers Raceway, supra*, at p 80 [FULD, J., dissenting]; *Boryszewski v. Brydges, supra,* at p 364).

The Legislature too has acknowledged that "each individual citizen and taxpayer of the state has an interest in the proper disposition of state funds and properties" (State Finance Law, § 123). Within two months of the *Boryszewski*

decision the Legislature added article 7-A to the State Finance Law, which also permits a citizen taxpayer to "maintain an action for equitable or declaratory relief, or both, against an officer or employee of the State who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property, except that the provisions of this subdivision shall not apply to the authorization, sale, execution or delivery of a bond issue or notes in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation" (State Finance Law, § 123-b, subd 1). The statute establishes a uniform procedure (State Finance Law, § 123-c), authorizes the court to require the plaintiff to post an undertaking as security costs (State Finance Law, § 123-d) and permits the court to reimburse the plaintiff for costs and attorney's fees if the action is successful (State Finance Law, § 123-g). The statute further provides that "[n]othing in this article shall abridge or alter rights of actions or remedies now or hereafter existing" (State Finance Law, § 123-i).

Subsequent to the effective date of article 7-A (Sept. 1, 1975; see L 1975, ch 827, § 2) *Boryszewski* was extended to permit a taxpayer to challenge the constitutionality of a revenue raising, as distinguished from an expenditure, measure. In *Wein v Carey* (41 NY2d 498, 500, 501, *supra*) it was held that a taxpayer had standing to contest the issuance of tax and revenue anticipation notes issued by the State. This was viewed as a logical consequence of *Wein v State of New York* (39 NY2d 136, *supra*), an earlier taxpayer's suit, which involved a claimed unconstitutional lending of the State's credit in connection with the issuance of State tax and revenue anticipation notes. In no case however have we held that a taxpayer has standing to

challenge the issuance of State bonds or bond anticipation notes. The question was raised in *New York Public Interest Research Group v Carey* (42 NY2d 527, *supra*) but was not reached because it was found that plaintiff's challenge to pending legislation was premature. And in *Wein v City of New York* (36 NY2d 610, 621, *supra*) the taxpayer's right to test the constitutionality of a municipal bond issue had been expressly granted by statute (General Municipal Law, § 51).

Thus the cases cited by the plaintiff do not in fact authorize this particular suit. But neither does article 7-A expressly prohibit the action as the defendants contend.

[1, 2] The "exception" concerning State bond issues and bond anticipation notes (State Finance Law, § 123-b, subd 1) is ambiguous. It is of course not a true exception since the statute only grants taxpayer standing with respect to State expenditures and does not include revenue raising. Neither can the "exception" be considered an express prohibition against such suits since, but its terms, the statute simply "shall not apply" in such cases. The plaintiff then cannot claim standing under the statute. That, however, still leaves open the question as to whether he can bring the suit under the rule adopted in *Boryszewski* in view of the fact that the Legislature specifically disclaimed any intent to "abridge or alter rights of actions or remedies now or hereafter existing" (State Finance Law, § 123-i).

[2] The difficulty with the wording of the statute is apparently largely due to the fact that it was drafted prior to *Boryszewski* and at a time when it was contemplated that the court would not alter the existing law (see appendix to respondent's brief). Thus, although it was not enacted until after *Boryszewski* was decided, it is not accurate to say, as the defendants urge, that the statute codified the decision, or as the plaintiff suggests, that it was intended to supplement

the decision by establishing an alternative and completely separate ground for suit.

In our view, now that the Legislature has spoken, the statute should be considered controlling where applicable. In cases where the statute has authorized a taxpayer's suite, that is, in cases involving a claimed unauthorized expenditure of State funds, the parties must follow the statutory procedures and, if required by the court, the plaintiff must post an undertaking for costs and the defendant may be ordered to pay costs and expenses. In suits not covered by the statute, such as taxpayers' challenges to tax or revenue anticipation notes, the question of standing must be resolved by the courts under common-law principles (see, e.g., *Wein v Carey*, 41 NY2d 498, *supra*).

The question of standing in the case now before us must also be resolved on common-law grounds because, as noted, the statute does "not apply" to taxpayer suits involving revenue raising through State bonds and bond anticipation notes. On the other hand, although the Legislature has not, in so many words, prohibited the suit, the statutory "exception" does indicate a reasonably clear legislative intent to prevent taxpayer challenges with respect to a State "bond issue or notes issued in anticipation thereof" (State Finance Law, § 123-b, subd 1). Under this circumstance it would be inappropriate for the courts to confer standing in these cases since such a determination would, in effect, render the statutory "exception" a nullity and ignore the expressed legislative policy to the contrary. Thus we have concluded that whether the taxpayer relies on the statute or the case law, he lacks standing to challenge the issuance of State bonds or bond anticipation notes.

We recognize that challenges of this nature - as opposed to those involving expenditures of State funds - are

often likely to increase the cost of raising the revenue by creating uncertainty in the minds of potential investors. Apparently this concern prompted the Legislature to deny standing to taxpayers in cases involving the sale of State bonds and bond anticipation notes (cf. *Wein v Carey*, 41 NY2d, *supra*, at p 502). This hazard, however, is also present in cases involving tax and revenue anticipation notes (see, e.g., *Wein v Carey, supra,* at p 502) and it is not clear why the Legislature did not express similar concern with the taxpayer challenges in these cases as well. In this and other respects the statute often creates ambiguities and incongruities which obscure the over-all legislative policy. This is not only a matter of concern for the courts but a question which the Legislature may wish to consider.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge COOKE and Judges JASEN, GABRIELLI and JONES concur with Judge WACHTLER; Judge FUCHSBERG taking no part.

Order affirmed.

Appendix J

Plaintiffs' Analyisis of *Wein v Comptroller*, 46 NY2d 394 (1979); and its Descendant *Schulz v State of New York*, 81 NY2d 336 (1993); This Analysis was Presented at Each Stage. (See Appendix K for a copy of the Opinion in *Schulz v State of New York, Supra) supra*)

Defendants argue that while the Court of Appeals, in Schulz I, II, [Schulz v State of New York, 81 NY2d 336 (1993)] granted citizens taxpayers voters standing to challenge Chapter 56's violations of the voter referendum requirement of Article VII, Section 11 of the State Constitution, the decision in Schulz I, II did not grant plaintiffs standing to challenge Chapter 56's violations of the State Constitution's restriction on the lending of the state's credit to public corporations under Article VII, Section 8, nor Chapter 56's violations of the State Constitution's restriction on the state's assumption of the liability of the obligations of public corporations under Article X, Section 5, of the State Constitution.

Plaintiffs argue that all three restrictions are designed to limit state debt and all are inextricably intertwined. Plaintiffs argue that the decision by the Court of Appeals in Schulz I, II granted citizen taxpayers voters standing to challenge Chapter 56 on the grounds of Article VII, Sections 8 and 11, and Article X, Section 5.

Alternatively, plaintiffs argue that plaintiffs standing to sue rises to a constitutional right on matters constitutional. Any act of the Legislature, including the exception under Section 123-b(1) of the State Finance Law, that is repugnant to any provision of the State Constitution is abrogated. Article I, Section 14, New York Constitution.

Section 123(b)(1) originally gave any citizen --

whether or not personally aggrieved -- standing to challenge any state employee who has caused, is causing or is threatening to cause, an illegal or unconstitutional disbursement of state funds.

The Legislature amended 123(b)(1) by tacking on an exception which read, "except that the provisions of this subdivision shall not apply to the authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the state...or any subdivision thereof...or by any public benefit corporation."

The result was meaningless. Section 123(b)(1) now reads, to paraphrase, citizens can challenge any state expenditures except that this provision shall not apply to revenue raising measures. What we have here is apples and oranges. Even the chief Judge of the Court of Appeals was dismayed by what he termed the ambiguities and incongruities. We read in Wein v Comptroller, 46 NY2d 394 (1979) at page 398 and 399:

"The 'exception' concerning State bond issues and bond anticipation notes...is ambiguous. It is of course not a true exception since the statute only grants taxpayer standing with respect to State expenditures and does not include revenue raising. Neither can the 'exception' be considered an express prohibition against such suits since, by its terms, the statute simply 'shall not apply' in such cases..."

After having said this, the decision went on to say,

"The question of standing in the case now before us must also be resolved on common-law grounds because, as noted, the statute does 'not apply' to taxpayer suits involving revenue raising through State bonds and bond anticipation notes." (emphasis added).

Plaintiffs here have been unable to find any common law principles which speak to the matter of standing or for that matter revenue raising through debt mechanisms. Were

such common law principles to be found they would immediately be abrogated as being repugnant to the State Constitution, which states in part, "...all such parts of the Common Law, and such of [statute law], or parts thereof, as are repugnant to this constitution, are hereby abrogated. Section 14, Article I. We need to be reminded that the word "hereby" extends up to the present time.

The higher court's reliance upon ~ fictitious common law principle should not be determinative in a matter where constitutional violations are alleged. Rather, standing must rise to the status of a constitutional right. This would appear to set aside any determinations of no standing in cases involving revenue raising measures such as are mentioned in Section 123(b)(1), irrespective of the interpretive or obfuscatory language used to disguise the real fabric of the standing question which is constitutional in cases involving constitutionality.

Appendix K

Opinion and Order of the New York Court of Appeals, dated May 11, 1994 Recognizing Citizen-Plaintiffs' Standing to Challenge State Statutes as Repugnant to one of the State Constitution's State Debt-Limiting Provisions (Article vii Section 11) But not the Other Two State Debt-Limiting Provisions (Article X Section 5 and Article vii Section 8)

STATE OF NEW YORK
COURT OF APPEALS

3 No. 43

In the matter of Robert L.
Schulz, et al., OPINION
Appellants,

v

State of New York, et al
Respondents.

3 No. 44
In the Matter of Robert L.
Schulz , et al .,
Appellants

v

The State of New York , et al .,
Respondents.

No. 43:

Robert L. Schulz, Pro se, appellant.
Peter G. Crary, for respondents.

No. 44:
Robert L. Schulz, pro se, appellant.
Frank K . Walsh, for respondents .

BELLACOSA , J .:

In these cases, a group of citizens challenges state financing schemes embodied ln Chapter 190 ("Schulz Appeal #1") and Chapter 220 ("Schulz Appeal #2") of the Laws of 1990. The lawsuits have failed up to now for lack of threshold standing to,sue. Appellants advance several theories to support their standing to sue on discrete aspects of the lawsuits, and argue on the merits that the various public financing statutes violate provisions of the New York state Constitution pertaining to how the state may incur debt. We conclude that the appellants in Schulz Appeal #1 should be accorded standing only on a constitutional voter basis. However, we affirm the order of the Appellate Division in that appeal on the sole ground of laches. In Schulz Appeal #2, we dismiss the appeal for lack of a preserved substantial constitutional question.

Despite the Court's dismissal of Schulz Appeal #2, the dissent nevertheless addresses a threshold preservation concern that is of no moment, because if that appeal did lie, the result in the case would be the same as the one the Court reaches in Schulz Appeal #1, i.e., affirmance on laches only .

I

Supreme Court dismissed those portions of the pleading challenging sections of Chapter 190 of the Laws of 1990 (the "Act") which deal with the extension of state

credit and long-term debt without voter approval . The dismissal was predicated on the authority of state Finance Law §123-b, New York state Coalition for Criminal Justice, Inc . v Coughlin (64 NY2d 660) and Wein v Comptroller (46 NY2d 394). In particular, the challenges to §§ 349 and 356, as well as portions of §§ 339, 342 and 371 of Chapter 190, were dismissed. The Supreme Court, however, found that "the remaining statutory provisions challenged by the petitioners do not address the'authorization, sale, execution or delivery of a bond issue ' [State Finance Law § 123-b] and petitioners do not seek to litigate that issue".

On the state defendants' appeal to the Appellate Division, that court reversed, finding that the challenges to all sections of the Act were interrelated and could not be effectively separated, since they "all stem from the initial issuance of the bonds in question". For standing purposes analysis only, we likewise treat those aspects as interrelated. The Appellate Division on that basis dismissed the entire proceeding (Mtr. of Schulz v State of New York, 180 AD2d 42). Appellants in Schulz Appeal #1 appeal from that Appellate Division order as of right on constitutional grounds (CPLR 5601[b][1]). The claim to standing as voters is expressly asserted in their primary pleading in this proceeding. The challengers asserted that they are registered voters and that they "have standing to maintain this action as voters who have been denied their right to vote in a referendum[ ] submitted to the people at a general election pursuant to Section 11 of Article VII of the State Constitution".

The challenge in the proceeding underlying Schulz Appeal #2 sought to invalidate various sections of Chapter 220 of the Laws of 1990 establishing the New York Local Government Assistance Corporation for the issuance of $4.7 billion in bonds. Both lower courts dismissed that proceeding outright on lack of standing. Significantly, plaintiffs in this case failed to allege their voter status as an express theory of

standing in their pleadings in that case. The appeal from the Appellate Division order in that matter is also taken as of right on constitutional grounds (CPLR 5601 [b] [11) .

Because appellants in Schulz Appeal #l asserted at the first opportunity in the pleadings their standing as voters pursuant to New York Constitution article VII, §ll, that precise Claim is Preserved With respect to the order of the Appellate Division Stemming from the State defendants' appeal in that court and the appeal from that order lies as of right. Because plaintiffs did not expressly allege voter standing in the proceeding underlying Schulz Appeal #2, no substantial constitutional question is presented and we thus dismiss that appeal and deny the motion for leave to appeal made at oral argument .

II.

Schulz Appeal #l to this Court, properly before us, requires us to decide the standing-to-sue issue in the context of the challenge to various sections of Chapter 190 of the state Laws of 1990. The Appellate Division dismissed that lawsuit in its entirety. The Act provides for the sale and leaseback of Attica Correctional Facility and Interstate Highway 287 by the state to a State-created public corporation. These sales were designed to generate $200 million and $30 million cash, respectively, as nonrecurring revenues, so called '"one shots". The purchases were financed by bond issues of the Urban Development Corporation during the fiscal year 1990-91. The appraisal of the standing issue presents a difficult and complicated question which is affected by weighty precedential and statutory factors.

Until 1976, this Court consistently "held that the constitutionality of a state statute may be tested only by one personally aggrieved thereby, and then only if the determination of the grievance requires a determination of

constitutionality" (St . Clair v Yonkers Raceway, 13 NY2d 72, 76, cert denied 375 US 970).

In Boryszewski v Brydges (37 NY2d 36 1), this Court loosened the reins, stating: "We hold today that a taxpayer has standing to challenge enactments of our State Legislature as contrary to the mandates of our state Constitution" (id., at 362 emphasis added) . The rationale for the expansive turnabout is simple, critical and compelling:

> We are satisfied that the time has now come when the judicially formulated restriction on standing (which we recognize has had a venerable existence) should be modified to bring our state's practice with respect to review of state legislative action into conformity not only with the practice in the majority of other states but also with the procedural standing of taxpayers to challenge local actions (General Municipal Law 51) . We are now prepared to recognize standing where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action. In the present instance it must be considered unlikely that the officials of state government who would otherwise be the only ones having standing to seek review would vigorously attack legislation under which each is or may be a personal beneficiary (id., at 364).

Part of the issue today is whether our precedents and legislation after Boryszewski reversed its forward thrust with respect to these public financing challenges. More precisely, the question is whether "'voters" may be turned out of court when they have been denied access to the voting booth in alleged violation of an express referendum right conferred by the New York Constitution. To draw from the key language of Boryszewski, should the Executive and Legislative Branches, with the support of our subsequent standing cases, be allowed to erect "an impenetrable barrier to any judicial

scrutiny of legislative actions" which are alleged to have violated the highest organ of law, the state Constitution itself? We conclude not. History and sound checks-and-balances principles of governance recognize the People as the source of all governmental power. Because the express voter referendum requirement to incur debt contained in Article VI I, § 11 is inextricably linked to the constitutional grant of debt-incurring authority, we determine that voter standing should be recognized in the proceeding culminating in Schulz Appeal #1.

The general constitutional authorization to contract public debt and, likewise, the referendum core of the constitutional limitation on the exercise of that power are contained in Article VII, §ll, of the New York Constitution. That section commands essentially that the state may borrow money only when a majority of the voters at a general election approve. The history of state finances and of the state Constitution provide clear evidence of the purport behind these provisions: Public indebtedness is viewed skeptically by the People of New York and must be tightly circumscribed by the People themselves and not entrusted finally even to their elected representatives . The constitutional prerequisite of a public referendum was considered the most effective way to avoid the "over-burdening of future generations by the incurring of long term debt for capital improvements" (Wein v Levitt, 42 NY2d 300, 304) . A similar skepticism applies to borrowing by long term debt to pay ordinary operating expenses of the government. The People of New York enacted this constitutional provision because history had shown them the governmental officials of the day are often tempted to borrow against the future under circumstances in which the electorate itself needs to exert the ultimate, prudent check-and balance (see, generally, Wein v State of New York, 39 NY2d 136, 141-145; see also, Newell v People, 7 N.Y. 9 [1852]; Francis Bergan, The History of the New

York Court of Appeals, 1847-1932, 53 [1985]) .

Serious concerns accompany a complete cloak of immunity that would preclude access to judicial review of challenged public financing schemes . Extension of the "taxpayer" standing limitations, to the extent urged by the state here (see, state Finance Law 123-b; New York state Coalition for Criminal Justice, Inc. v Coughlin, 64 NY2d 660, supra; Wein v Comptroller, 46 NY2d 394 , supra), logically and practically confers on the Legislature and Executive the power never again to submit their long-term debt financing schemes to the voters . The core provision of Article VII, §11, directing a voters' constitutional referendum as protection against imprudent public financing, would be rendered not just moribund but dead. since that protection emanates from the People and reserves that ultimate check to themselves, we cannot allow that right to become a dead letter, a mere set of hollow words.

The state defendants strongly counter, however, with the argument that the interests of "taxpayers" and "voters" in participating in the control of excessive or imprudent government debt are logically and virtually identical. since our own precedents, Wein v Comptroller (46 NY2d 394, supra) and New York State Coalition for Criminal Justice, Inc. v Coughlin (64 NY2d 660, supra), bar "taxpayer" standing to challenge the issuance of bonds or bond anticipation notes, and state Finance Law §123-b does not explicitly accord standing to taxpayers in such instances, the state contends that "voter" standing in this case is unavailable. In sum, the state's position is that, driven inexorably by the force of the cited authorities, the right to vote on a debt referendum pursuant to Article VII, §ll, does not allow for separate and independent standing to sue. We disagree, and note that to the extent that Wein v Comptroller (supra), New York state Coalition for Criminal Justice, Inc. v Coughlin (supra) and state Finance Law 123-b have been read as a total ban on standing in such cases, they should not

be followed, at least with respect to voter standing to Sue on financing schemes subject to voter referendum approval .

III

In Schulz Appeal #1, since the appeal lies and the challengers enjoy constitutional voter standing, we would ordinarily turn next to the merits. However, another distinct threshold procedural issue commands our attention -- the applicability of the equitable doctrine of laches. Indeed, because of the disposition of the case up to now on lack of standing only, the lower courts did not address the merits of appellants' fiscal challenges and the state has not argued the merits in its briefs to this Court.

The laches hurdle is necessarily implicated. Appellants assert that they started their lawsuit within one year of the enactment of the enabling legislation, within one year of the adoption of the budget for the pertinent fiscal year, within 60 days of the actual sales of bonds, within one month of learning from newspapers about the state's actions, and prior to the adoption of the next annual budget. They insist that should be prompt enough to avoid the laches bar. Those time periods, however, do not in and of themselves resolve this issue. We must examine and explore the nature and subject matter of the particular controversy, its context and the reliance and prejudicial impact on defendants and others materially affected. Broadly stated, the profound destabilizing and prejudicial effects from delay may be decisive factors. These considerations must be examined for their impact on the State, on the operation and maintenance of orderly government, on those with whom the state engaged in these multimillion dollar financing transactions, and on society in general. Turning then with further particularity to the application of the laches doctrine in this case, we note that this Court has said:

Laches is defined as "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. " The essential element of this equitable defense is delay prejudicial to the opposing party (Matter of Barabash, 31 NY2d 76, 81 [citation omitted]) .

Because the effect of delay on the adverse party may be crucial, delays of even under a year have been held sufficient to establish laches (see, Matter of Eberhart v La Pilar Realty Co., 45 AD2d 679; Finn v Morgan Is. Estates, 283 App Div 1105).

Chapter 190 of the Laws of 1990 was signed into law on May 15, 1990. The pertinent action attacking that enactment was not commenced until April 29, 1991. During that time, the challenged financing plans were transacted in reliance on the presumed constitutionality and regularity of Chapter 190. A total of $377,326,674 in bonds were issued and sold to investors . The sales of Attica Correctional Facility and Interstate Highway 287 were completed, various other non-bond transactions were also carried out, and proceeds of $200 million and $20 million, respectively, were deposited in the Capital Projects Fund and General Fund.

Appellants' demand for relief on the merits of their constitutional challenge would have the bonds recalled and refunded and the non-bond transactions nullified. Metaphorically, the impossibility of putting qenies back in their bottles springs to the imagination. Realistically, constitutional challenges to public financing of such massive and profound dimension, possibly causing traumatic disturbance to settled matters of public finances and governance, should be undertaken reasonably promptly. To relax this procedural safeguard could disproportionately incur or threaten a greater harm to the public weal than the alleged constitutional transgression itself. Undoing such closed

financial transactions would also add hundreds of millions of dollars of unplanned expenditures to the taxpayers' burdens. In sum, fiscal year 1990-91 has come and gone and its financial books in this respect have been closed. Equitable considerations of time, in the laches sense, may justifiably keep them closed and do not warrant, in the circumstances presented here, a piecemeal invalidation challenge as suggested (Dissenting opn, at 5) . We find persuasive support in both NYPIRG v Levitt (62 AD2d 1074, appeal dismissed 46 NY2d 849) and Burns v Egan (117 AD2d 38, appeal dismissed 68 NY2d 806, lv denied 69 NY2d 602). In both cases, the Appellate Division held that the sale of bonds during the period of delay constituted an important element of the prejudice which warranted application of the doctrine of laches. That is true in this case as well.

In another relevant though different context, this Court addressed the prejudice to State and local governments that occurs when challenges to State financing plans are delayed. The Court, in applying the legal limitations bar, a four-month Statute of Limitations for challenging Medicaid reimbursement rates, stated:

> Of special significance in the present instance is the impact on state and local budgetary planning which application of a six-year statute of Limitations would introduce. One can visualize the fiscal complexity which would ensue if financial planning for a program with broad ramifications of Medicaid were subjected to individual challenges for a period of up to six years (Solnick v Whalen, 49 NY2d 224, 232).

We are unanimous that the pertinent constitutional right should be subject to judicial and popular scrutiny. In contrast to our dissenting colleague, however, we conclude that judicial review may be undertaken only upon a proper and timely invocation, including satisfaction of equitable

laches prerequisites in the context of the particular dispute. Only then can alleged constitutional transgressions be addressed and remedied on the merits (see, e.g., Flushing Nat. Bank v Municipal Assistance Corp. for the City of N.Y., 40 NY2d 731 , 1088, 1094). The state defendants' arguments persuade us that the time periods involved here do not meet the threshold test in light of the great prejudice certain to be inflicted on the state and its citizens at large when financial transactions of such magnitude and destabilizing impact are at stake and may be upset. Time must be of the essence and here appellants, for all their good faith intentions in acting expeditiously as pro se litigants, did not satisfy that essential ingredient.

Because laches blocks our review of any of the substantive objections from appellants in this case, we emphasize that no inferences should be speculated upon or drawn as to the merits. Our references to any of the merits arguments, and to the history and the nature of the controversy, pertain solely and necessarily to our contextual consideration and application of the standing and laches doctrines. Notably, inasmuch as standing will now be available to voters, cases may develop in due time in which the courts will have to grapple and come to terms with the merits. We conclude that the time has not come here. So that there should be no misunderstanding or misdirection in view of the dissenting expression, prudence also dictates that we note that this case and our standing precedents, even to the extent expanded today, do not constitute implied endorsements or condemnations of the merits of any of the financing mechanisms that have been the subjects of challenge (see e.g., New York State Coalition for Criminal Justice, Inc. v Coughlin, 64 NY2d 660, supra; Wein v Comptroller, 46 NY2d 394, supra). The court today says and implies nothing about the constitutionality or merits of these financing mechanisms. Such questions remain open to substantive review and resolution in future cases.

Accordingly, the order of the Appellate Division should be affirmed, without costs, in Schulz Appeal #1 on the sole ground that the commencement of the litigation does not satisfy the equitable laches doctrine in the particular context and circumstances of this case. In Schulz #2, the appeal should be dismissed, without costs, on the ground that a preserved substantial constitutional question is not directly involved and the motion for leave to appeal should be denied.

Smith, J. (dissenting):

In these cases, the constitutionality of the State financing schemes set forth In Chapter 190 ("Schulz Appeal #1") and Chapter 220 ("Schulz Appeal #2") of the Laws of 1990 has been challenged by a group of citizens, appearing Pro-se ("plaintiffs"). The State and numerous State officials and agencies are named as defendants. The majority has concluded that plaintiffs have standing to maintain one of these actions "on a constitutional voter basis only" (Schulz Appeal #1, slip opn, at 2) .

Nevertheless, the majority did not reach the merits in either appeal because it concluded that the action in Schulz Appeal #1 was barred by laches and that Schulz Appeal #2 lacked "a preserved substantial constitutional issue" and, therefore, warranted dismissal. I concur with the majority to the extent that plaintiffs in Schulz Appeal #1 are held to have standing. However, I conclude that substantial constitutional issues have been preserved in Schulz Appeal #2 and that, in both Schulz Appeal #1 and #2, laches should not be a bar to a determination on the merits of these alleged constitutional violations, which are continuing in nature because of their long-term fiscal impact and any continuing authority under the challenged legislation. Therefore, Schulz Appeal #1 should be remanded to Supreme Court for a determination on the merits, and Schulz Appeal #2 should be remanded to the

Appellate Division to address the determination on the merits by Supreme Court. Accordingly, I dissent.

With respect to Schulz Appeal #1, various sections of Chapter 190 of the State Laws of 1990 ("the Chapter 190 legislation") permitted the sale and leaseback of Attica Correctional Facility ("Attica") and Interstate 287, generating $200 million and $30 million, respectively. This was financed by the issuance of bonds by the Urban Development Corporation and the Thruway Authority. The Chapter 190 legislation also authorized the Housing Finance Agency ("HFA") to issue up to $500 million in bonds and notes, secured by the State, to fund housing capital program expenditures. As to Schulz Appeal #2, Chapter 220 of the Laws of 1990 ("the Chapter 220 legislation") established the New York Local Government Assistance Corporation ("LGAC") and authorized it to issue $4.7 billion in bond obligations, payable from State taxes. The challenged statutory provisions in both appeals were not submitted for approval in a voter referendum. Plaintiffs allege that by these actions the state incurred debts in violation of the New York Constitution article VII, § 11 (voter referendum required to incur state debt); article VII , § 8 (loan of state's credit to a public benefit corporation prohibited); and article X, § 5 (assumption by state of the obligations of a public benefit corporation prohibited) .

The Chapter 190 legislation became law on May 25, 1990. The petition challenging that legislation was served upon the Attorney-General on April 29, 1991. According to defendants, the sale and leaseback of Attica was completed on February 1, 1991. Plaintiffs allege that the bonds for this deal were sold on February 26, 1991. The Interstate 287 and HFA bonds were issued in March 1991. Indeed, defendants have alleged that the transactions authorized by this legislation were completed and the proceeds disbursed prior to April 29, 1991. This totaled over $377 million in bonds, with the resulting indebtedness of principal and accruing

interest payments. Significantly, although HFA was authorized to issue up to $500 million in bonds and notes (see, sections 370 and 371), only approximately $104 million worth had been issued prior to this litigation and the record does not indicate whether further offerings were made in fiscal year 1991-92, subsequent to the commencement of this proceeding. Moreover, the 1991-92 budget was not adopted until July 4, 1991. Thus, when this proceeding was commenced, there was a potential for the incursion of additional debt by the further issuance of HFA bonds and the possibly that the 1991- 92 budget could address any problems created by the litigation. Nevertheless, Supreme Court addressed the issue of laches and found no showing of prejudice to the defendants but did find efforts by the defendants to delay a decision on the merits.[10] Specifically, Supreme Court stated the following:

> In order to invoke the doctrine of latches [sic] a litigant must establish that there has been delay, which is prejudicial to it. (see: New York Public Interest Research Group v Levitt, 62 AD2d 1074). In the case at bar, respondents/defendants have not established the requisite prejudice, and as such, the motion to dismiss upon the doctrine of latches [sic] must be denied. Indeed, they still do not appear to be in any hurry to reach a determination on the merits, given the fact that they have sought a further delay of this litigation by failing to join issue in an expeditious fashion.

The chapter 220 legislation at issue in Schulz Appeal

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[10] The Appellate Division did not address the laches issue in Schulz Appeal #1, finding it unnecessary to do so because of its determination that plaintiffs lacked standing to bring the action.

#2 became law on June 11, 1990. On or about February 10, 1992, plaintiffs served the petition upon which that appeal is predicated. Prior to the commencement of this proceeding, $2.4 billion in bonds was sold by LGAC--allegedly during the period between February 21, 1991 and December 12, 1991. However, there were pending transactions. Specifically, as indicated by the February 28, 1992 affidavit of Maryanne Gridley, an Assistant Deputy Comptroller for the state, future bond offerings were in jeopardy because of the temporary restraining order obtained by the plaintiffs. In addition, the February 27, 1992 affidavit of Patrick J. Bulgaro, Director of the Budget of the state of New York, argued against plaintiffs ' request for injunctive relief to permit "the last $300 million in LGAC bonds" to be sold. Those bonds were issued in March 1992 and the projected aggregate debt service cost for the years 1992 through 2021 is in excess of $6.4 billion. The Bulgaro affidavit also indicates that in fiscal year 1992-93 or thereafter up to $l billion in additional proceeds from bond sales was possible because the legislation authorized a total of $4.7 billion ($1-6 billion obtained in fiscal year 1991-92 and $2.1 billion prior thereto); Despite these facts, Supreme Court concluded that even though only $2.4 billion of the authorized $4.7 billion in bonds had been sold, it would be prejudicial to halt the sale of other bonds . [11] This ruling was in error.

It is clear that at the time that both of these proceedings were commenced, the issue of the constitutionality of the challenged legislation was viable because the authority to incur debt remained. Under such circumstances, the doctrine of laches should not bar a determination on the merits.

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[11] In Schulz Appeal #2, the Appellate Division did not address the issue of laches, instead deciding the case on the issue of standing.

Furthermore, the merits of the defense of laches-delay and prejudice to defendants--must be determined within the context of the plaintiffs' claims. Here, even if defendants ' transactions have been completed, plaintiffs' allegation of an unconstitutional and continuing wrong of such magnitude that it will extend into the next century must present a greater concern. since the alleged violations are constitutional and continuing with respect to the accrual of interest on the debt and the possibility of further actions pursuant to the challenged legislation, there is a dual basis for rejecting the laches defense (see, Mtr . of Burke v Sugarman, 35 NY2d 39, 45 [laches inapplicable because the,"failure to comply with constitutional requirements for making appointments of eligibles to competitive positions is a continuing and constitutional wrong"]). Indeed, in rejecting the application of laches to bar challenges to alleged erroneous appointments because of the continuing failure to adhere to the constitutional requirements, this court has stated that "though made in good faith [these actions] ought to be open to attack by the petitioners, because as citizens and taxpayers they are entitled to an opportunity to insist upon the construction which this court placed upon the. . . state Constitution" (Mtr. of Cash v Bates, 301 NY 258, 261). As such, the claims herein should not be barred by laches.

In addition, it is difficult to comprehend, upon reading the record in Schulz Appeal #2, how the majority can conclude either that the plaintiffs failed to allege voter standing or that no substantial constitutional question has been preserved. First, the plaintiffs asserted voter standing. Specifically, in the amended complaint of February 10, 1992, plaintiffs Schulz, Salvador and Boehm each alleged that he was "a registered voter registered to vote" in a particular town, that he "voted in the last general election," and that he "is eligible to vote in the next referendum in a general

election in New York state."[12] Second, in the first cause of action, the plaintiffs allege a "violation of Article VI I, Section 11 of the state Constitution" (requiring a referendum to incur debts, with certain exceptions) . This allegation is repeated throughout the complaint. Defendants clearly understood that voter standing was being alleged. In the affirmation in support of the motion to dismiss, defendants argued, "since plaintiffs have alleged no injury in fact but only allege their citizen taxpayer and voter status as the basis of standing, they have no standing and the complaint must be dismissed. " Plaintiffs ' supplemental affidavit in opposition to the motion to dismiss addressed the issue of constitutional voter standing by citing New York State Coalition for Criminal Justice v Coughlin (103 AD2d 40, affd 64 NY2d 660) where the Appellate Division did not reach the issue because it was raised for the first time on appeal and was not supported by allegations in the record. Plaintiffs were thus contending that these deficiencies were not present in their case. Indeed, in this case the Appellate Division did reach the issue, albeit unfavorably for plaintiffs (Schulz v State of New York, 185 AD2d 596, 597). Therefore, the issue of voter standing has been before the court since the inception of this litigation (Schulz Appeal #2) and the substantive nature of the constitutional contentions is indisputable.

Finally, it must be emphasized that a determination on the merits of these appeals has not been made and none has been suggested. A determination of constitutionality would obviously end the matter, whereas a finding of unconstitutionality would raise the issue of an appropriate remedy. In such a case, the court is free to consider whether

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[12] In Schulz Appeal #1, the plaintiffs, in addition, allege that they "have standing to maintain this action." Thus, the specific factual allegations as to voter standing are the same in both cases.

or not such remedy should be purely prospective. What this court should not do is fail to allow the merits of these constitutional issues to be addressed.

No. 43: Order affirmed, without costs . Opinion by Judge Bellacosa. Chief Judge Kaye and Judges simons, Titone and Hancock concur. Judge Smith dissents in an opinion.

No. 44: Appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Opinion by Judge Bellacosa . Chief Judge Kaye and Judges Simons, Titone and Hancock concur. Judge Smith dissents in an opinion.

Decided May 11, 1993

(2)

94-996

No. 94-584

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

ROBERT L. SCHULZ, JOHN SALVADOR, JR., GILBERT O. BOEHM, CHARLES D. BURGE, PHD., LELAND D. RYAN, SUZAN DIANE LA DUE, DOUGLAS FREDERICK WATSON, RICHARD ALLEN BERRY, JOHN B. SIBLEY, JR., CLAUDE F. SPROWLS, GARY L. WILLIAMS, ANDREA VECCHIO, STEPHEN LANDES, ERICK FRENKE, TAI AGUIRRE, EDWARD THOMAS, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and EMANUEL A. CATANUTO,

Petitioners,

against

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, SENATE PRESIDENT *PRO-TEM*; SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; THE OFFICE OF THE STATE COMPTROLLER, H. CARL MC CALL, COMPTROLLER; THE OFFICE OF THE DIVISION OF THE BUDGET, PATRICK J. BULGARO, DIRECTOR; THE METROPOLITAN TRANSPORTATION AUTHORITY, ROBERT R. KILEY, CHAIRMAN; AND THE NEW YORK STATE THRUWAY AUTHORITY, PETER TUFO, CHAIRMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENTS IN OPPOSITION

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(4638 – 1994)

Question Presented

Whether there is a federal question presented by a case in which the State's highest court unmistakably has ruled that the purported property interest upon which petitioners base their due process argument does not exist under state law.

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No. 94-5845

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROBERT L. SCHULZ, JOHN SALVADOR, JR., GILBERT O. BOEHM, CHARLES D. BURGE, PHD., LELAND D. RYAN, SUZAN DIANE LA DUE, DOUGLAS FREDERICK WATSON, RICHARD ALLEN BERRY, JOHN B. SIBLEY, JR., CLAUDE F. SPROWLS, GARY L. WILLIAMS, ANDREA VECCHIO, STEPHEN LANDES, ERICK FRENKE, TAI AGUIRRE, EDWARD THOMAS, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and EMANUEL A. CATANUTO,

Petitioners,

-against-

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, SENATE PRESIDENT PRO-TEM, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; THE OFFICE OF THE STATE COMPTROLLER, H. CARL MC CALL, COMPTROLLER; THE OFFICE OF THE DIVISION OF THE BUDGET, PATRICK J. BULGARO, DIRECTOR; THE METROPOLITAN TRANSPORTATION AUTHORITY, ROBERT R. KILEY, CHAIRMAN; AND THE NEW YORK STATE THRUWAY AUTHORITY, PETER TUFO, CHAIRMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENTS IN OPPOSITION

Statement of the Case

Plaintiffs, all registered voters in the State of New York, commenced a *pro se* action by service of a summons and verified complaint/petition on May 24, 1993, seeking a judgment declaring, *inter alia*, that a New York statute, chapter 56 of the Laws of 1993 (hereinafter "the Act"), violated various provisions of the New York State Constitution by (1) authorizing the issuance of long-term, tax-supported State debt without voter approval (NY CONST art VI, § 11), (2) authorizing a gift or loan of the State's credit (NY CONST art VI, § 8), and (3) assuming the liability of a public corporation (NY CONST art X, § 5). On June 30, 1994, the New York State Court of Appeals held that the obligations authorized by the Act, which expressly are not the obligations of the State, but instead are the special obligations of the issuing independent public authorities which will be repaid by the issuer solely from funds the State may, but is not obligated to, appropriate each year, are not "debt" of the State. Accordingly, as stated by the court:

> Because the State does not become indebted, the financing subject to appropriation does not constitute the lending of credit or assumption of liability of a public corporation, or indebtedness of the State for purposes of the constitutional limits on such debt. Instead, the funds -- if appropriated -- constitute a permissible gift of money to a public corporation out of existing revenues, creating no debt.

Schulz v State of New York, 84 NY2d 231, 250-51, 639 NE2d 1140, 1150, 616 NYS2d 343, 353 (1994); Petitioners' Appendix, at A-19 (citations omitted).

This brief in opposition to the petition for a writ of certiorari is submitted on behalf of all respondents: the State of New York, the Governor, the State Legislature, the President of the Senate, the Speaker of the Assembly, the State Comptroller, the Division of the Budget, and the Budget Director (hereinafter "State Respondents"), respondents New York State Thruway Authority, Peter Tufo, Chairman, and respondents Metropolitan Transportation Authority, Peter E. Stangl, Chairman.

REASONS FOR DENYING THE WRIT

As this Court has held, anything short of a legitimate claim of entitlement precludes a finding that state law has created a liberty or property interest triggering due process safeguards. *See, Board of Regents v Roth*, 408 US 564, 577 (1972). It also is axiomatic that this Court's jurisdiction fails where the judgment of a state court rests upon an independent non-federal ground which is adequate to support the judgment. *See, Fox Film Corp. v Muller,* 296 US 207, 210 (1935). Thus, where recognition of the property interest underlying a due process claim is based upon an interpretation of state law which has been authoritatively rejected by the State's highest court, this Court is without jurisdiction to grant the writ.

Here, petitioners' due process argument is dependent upon their argument that the New York State Constitution creates a property interest by subjecting the contracting of debt by the State to a public referendum and that this property interest was taken away, without due process of law, by way of the challenged legislation. As noted above, however, the State's highest court has rejected petitioners' arguments, ruling that the challenged legislation does not authorize debt of the State, but instead authorizes only the issuance of debt by an independent

public authority. Thus, there is no action authorized which would be subject to the state constitution's public referendum requirement, nor is there any lending of credit or assumption of liability of a public corporation. These rulings on state law constitute independent non-federal grounds which are adequate to support the judgment of the State's highest court and preclude this Court's consideration of the federal questions raised by petitioners.

CONCLUSION

THE WRIT SHOULD BE DENIED.

Dated: Albany, New York
December 22, 1994

Respectfully submitted,

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No. 94-996

(3)

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In The

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October Term, 1994

ROBERT L. SCHULZ, JOHN SALVADOR, JR., GILBERT O. BOEHM, CHARLES D. BURGE, PHD., LELAND D. RYAN, SUZAN DIANE LA DUE, DOUGLAS FREDERICK WATSON, RICHARD ALLEN BERRY, JOHN B. SIBLEY, JR., CLAUDE F. SPROWLS, GARY L. WILLIAMS, ANDREA VECCHIO, STEPHEN LANDE, ERICK FRENKE, TAI AGUIRRE, EDWARD THOMAS, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and EMANUEL A. CATANUTO,

Petitioners,

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, SENATE PRESIDENT PRO-TEM, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; THE OFFICE OF THE STATE COMPTROLLER, H. CARL MC CALL, COMPTROLLER; THE OFFICE OF THE DIVISION OF THE BUDGET, PATRICK J. BULGARO, DIRECTOR; THE METROPOLITAN TRANSPORTATION AUTHORITY, ROBERT R. KILEY, CHAIRMAN; THE NEW YORK STATE THRUWAY AUTHORITY, PETER TUFO, CHAIRMAN,

Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION

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PETITIONERS HAVE A LEGITIMATE CLAIM TO THEIR MONEY PROPERTY WHICH STEMS FROM THE NEW YORK CONSTITUTION.

"Property interests are not created by the [federal] constitution; rather they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as a state law -- rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." Board of Regents v. Roth, 408 US 564, 577 (1972).

Petitioners' right to their money property stems from the New York Constitution which guarantees petitioners a right to live a life free of a taking of their money property by the State in ways that are expressly forbidden, and a further right to petition the government for a redress of grievances suffered because of the State's violation of those money-taking prohibitions.

It is essential to the orderly pursuit of happiness that petitioners be able to keep from the State as much of their earnings as is legally possible.

The New York Constitution expressly forbids the State from taking petitioners' money (through statewide taxes and fees) for the purpose of paying principal of and interest on any debt "contracted by or in behalf of the State", without the consent of the governed (see article VII, section 11), or of paying principal of or interest on any debt issued by any of the State's public corporations (See article X, Section 5). The New York Constitution goes so far, in protecting petitioners' money property, as to forbid the State from putting petitioners' money property at risk of being used to pay principal of or interest on any debt issued by any of the State's public corporations by expressly forbidding the State from giving or lending its credit to or in and of any of the State's public corporations (See Article VII, Section 8).

The Bill of Rights of the New York Constitution further secures petitioners' interest in their money property by expressly guaranteeing petitioners a fundamental right to petition the judiciary for a redress of grievances if and when the State Legislature and Executive branches violate said prohibitions (See Article I, Section 9.1) and by expressly forbidding the State from taking petitioners' money property without constitutional due process (See Article I, Sections 6 and 7).

Petitioners have a legitimate claim of entitlement to their money property. That claim of entitlement is grounded in the New York Constitution which defines purposes for and ways in which our money may not be taken from us by the State, and our right to bring government officials before judiciary if they violate those restrictions.

To determine whether due process requirements apply, courts may not look to the "weight" but to the "nature" of the interest at stake to see if the interest is within the fourteenth amendment's protection of liberty and property.

In a constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

THE JUDGMENT BY THE COURT OF APPEALS RESTS ON FEDERAL AND NON-FEDERAL GROUNDS; THE NON-FEDERAL GROUNDS ARE NOT INDEPENDENT OF THE FEDERAL GROUNDS

"Where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the Supreme Court is without jurisdiction to renew if the non-federal ground is independent of the federal ground and adequate to support the judgment". Fox Film Corp. v. Muller, 296 US 207 (1935).

The non-federal grounds of the judgment by the Court of Appeals are not all independent of the federal grounds.

And, the non-federal ground that may be independent of the federal ground is certainly not adequate to support the judgment.

The judgment by the New York Court of Appeals rests on federal grounds: plaintiffs were denied their first amendment right to petition their government for violating Article X, Section 5 and Article VII, Section 8 of the New York Constitution; plaintiffs' fifth and fourteenth amendment rights against a taking of their money and credit property were denied by a ruling that the rights of the State public corporations -- the issuers of the debt on behalf of the State -- to debt service payments from the State, and the rights of the bondholders themselves are "not legally enforceable rights" against the State and, therefore, the petitioners' money.

The judgment by the New York Court of Appeals also rests on non-federal (State) grounds: plaintiffs were denied their right, under Article I, Section 9.1 of the New York Constitution, to petition their government for violating Article X, Section 5 and Article VII, Section 8 of the New York Constitution; plaintiffs' rights under Article I, Sections 6 and 7 of the New York Constitution against a taking of their money and credit property for uses prohibited by Article VII, Section 11 of the New York Constitution were denied by a ruling that the rights of the State's public corporations -- the issuers of the debt in behalf of the State -- to debt-service payments from the State, and the rights of the bondholders themselves are "not legally enforceable rights" against the State and, therefore, the petitioners' money.

Obviously, the judgment's grounds denying plaintiffs their rights to petition (under Article I, Section 9.1 of the New York Constitution and under the First Amendment to the federal constitution) and their right against a taking of their property without constitutional due process (under Article I, Sections 6 and 7 of the New York Constitution and